



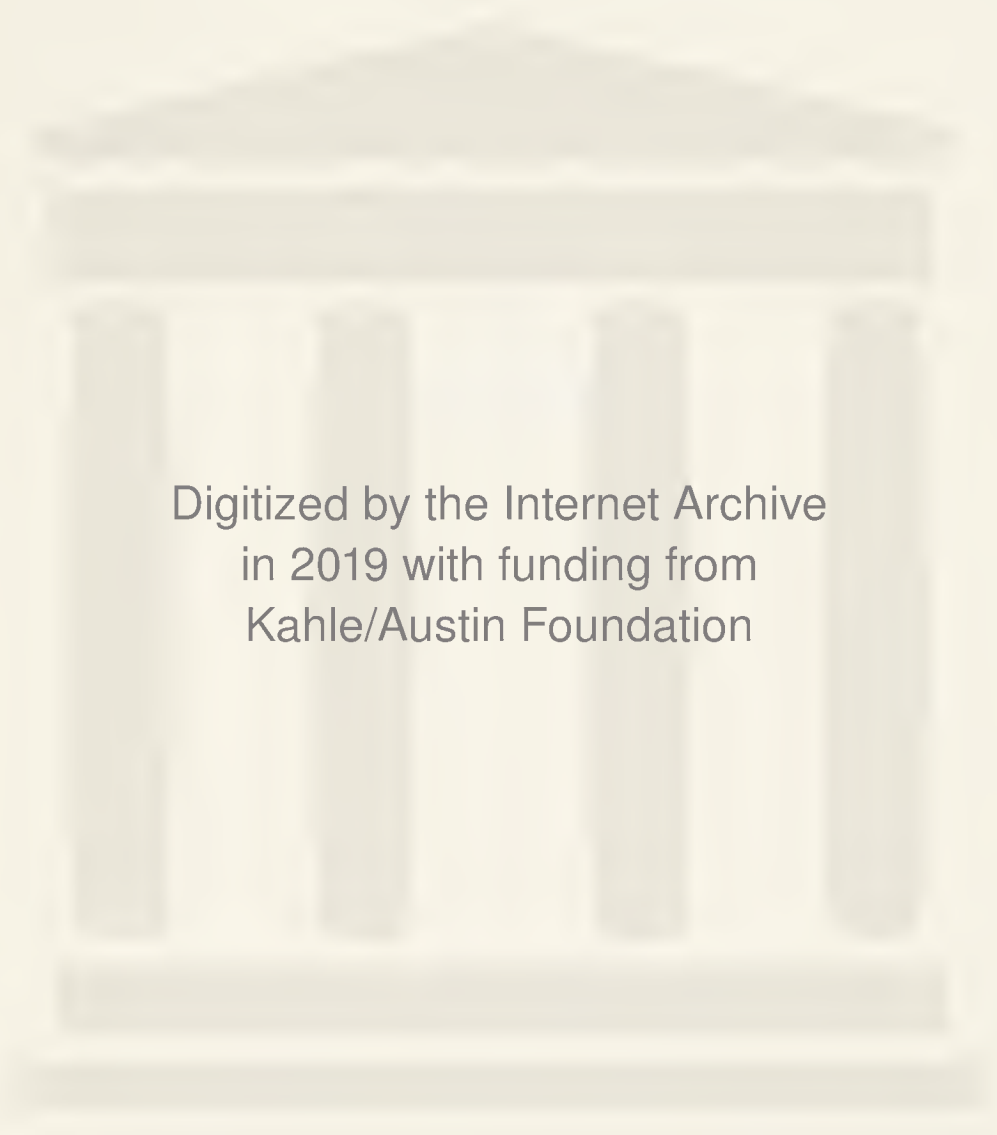


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THE BRITISH YEAR BOOK OF  
INTERNATIONAL LAW





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## REPRISALS BY THIRD STATES\*

By DR. MICHAEL AKEHURST

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It is well established that a State which has been injured by a breach of international law may take reprisals against the State which has injured it. But may third States (i.e. States which are not the direct victims of the breach of international law) also take reprisals against the wrong-doing State?

There is a long line of academic opinion which holds that third States may take reprisals. Thus Grotius, after stating the general principle that kings may make war in order to impose punishments (*poenae*) on those who break the law, writes:

The fact must also be recognized that kings . . . have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever . . . Truly it is more honourable to avenge the wrongs of others rather than one's own, in the degree that in the case of one's own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his [one's] mind.

This right, he says, is derived from a similar right of individuals in a state of nature, which they gave up to society.<sup>1</sup>

Similar views were expressed by Vattel:

The laws of the natural society of nations are so important to the welfare of every State that if the habit should prevail of treading them under foot no nation could hope to protect its existence or its domestic peace . . . Now all men and all nations have a perfect right to whatever is essential to their existence, since this right corresponds to an indispensable obligation. Hence all nations may put down by force the open violation of the laws of the society which nature has established among them, or any direct attacks upon its welfare.<sup>2</sup>

More recently several writers, such as Fauchille, Hodges, Oppenheim and Stowell, have held that a third State may 'intervene' in order to redress breaches of universally recognized rules of international law committed against another State;<sup>3</sup> since intervention is usually regarded as illegal in the absence of some valid justification, intervention by one State to

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<sup>1</sup> *De Jure Belli ac Pacis*, book II, chapter 20, para. 40 (Carnegie translation). He admits that Victoria, Vázquez, Azor and Molina thought that third States had no right to make war in such circumstances.

<sup>2</sup> *The Law of Nations: Carnegie Classics of International Law* (1916), vol. 3, p. 8.

<sup>3</sup> P. Fauchille, *Traité de droit international public*, vol. 1, part 1 (1922), p. 570; H. G. Hodges, *The Doctrine of Intervention* (1915), pp. 37-8; L. Oppenheim, *International Law*, vol. 1 (8th ed., by H. Lauterpacht, 1955), p. 308; E. C. Stowell, *Intervention in International Law* (1921), pp. 46-7.

redress an illegal act done to another State is in effect a form of reprisals by a third State. However, some writers maintain that intervention is justified only by certain types of illegal acts. Hall, for instance, writes:

When a State *grossly and patently violates international law in a matter of serious importance*, it is competent to any State, or to the body of States, to hinder the wrongdoing from being accomplished, or to punish the wrong-doer . . . Whatever may be the action appropriate to the case, it is open to every State to take it. International law being unprovided with the support of an organized authority, the work of police must be done by such members of the community of nations as are able to perform it.<sup>1</sup>

Likewise, Westlake states that third States may intervene only if the illegal act is likely to lead to war between the States concerned.<sup>2</sup>

It is interesting to note that Tunkin considers that an illegal act by one State gives rise to legal responsibility *vis-à-vis* all States in *certain* cases, especially if the illegal act consists of the use or threat of force, or 'en cas de violation du principe de la liberté de la haute mer, de celui de la protection des ressources naturelles de la mer du fait de leur usage déprédateur, etc.' He regards this extension of responsibility as a new development, and does not really discuss the possibility of reprisals;<sup>3</sup> but the theory that certain acts violate the legal rights of every State in the world surely suggests, as a natural corollary, that every State is entitled to take reprisals against such acts.

Other writers state categorically that third States may not take reprisals,<sup>4</sup> although some of them suggest that the position should be otherwise *de lege ferenda*.<sup>5</sup> An even greater number of authors, such as Briggs, Brownlie, Hyde, O'Connell, Rousseau and Sørensen, ignore the question altogether—or, rather, they define reprisals as action taken by the injured State<sup>6</sup> and make no mention of the possibility of third States' taking reprisals.

When we turn from the writings of publicists to the other sources of international law, we find an almost complete absence of authority (apart from certain special situations which will be discussed later).<sup>7</sup>

In *United States v. The Schooner La Jeune Eugénie*,<sup>8</sup> Mr. Justice Story said *obiter*:

No nation has a right to infringe the law of nations, so as thereby to produce an injury to any other nation. But if it does, this is understood to be an injury, not against

<sup>1</sup> W. E. Hall, *A Treatise on International Law* (8th ed., by A. Pearce Higgins, 1924), pp. 65–6 (italics added). This passage appears in Hall's chapter on intervention.

<sup>2</sup> J. Westlake, *International Law* (1904), vol. 1, p. 304.

<sup>3</sup> G. I. Tunkin, *Droit international public: problèmes théoriques* (1965), pp. 220–4.

<sup>4</sup> D. Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale* (1902), pp. 88–9; P. Jessup, *A Modern Law of Nations* (1948), pp. 10–12; P. B. Potter, 'L'intervention en droit international moderne', *Recueil des cours*, 32 (1930), pp. 611, 651; E. Root, 'The Outlook for International Law', *Proceedings of the American Society of International Law* (1915), pp. 2, 8–9; A. Ross, *A Textbook of International Law* (1947), p. 255.

<sup>5</sup> e.g. Jessup and Root (see previous note).

<sup>6</sup> See also *Annuaire de l'institut de droit international*, 38 (1934), p. 708.

<sup>7</sup> See below, pp. 4–14.

<sup>8</sup> (1822), 2 Mason's Reports 409.

all nations, which all are bound or permitted to redress, but which concerns alone the nation injured.

At first sight, the actual judgment in the case does not appear very consistent with this dictum; the court held that the slave trade was contrary to customary international law and that therefore the United States Navy was entitled, under customary law, to seize a French merchant ship engaged in the slave trade, although no United States interest was involved. But the United States' quarrel was with the French ship-owners, not with the French Government, and the United States Government gave the ship back to the French Government; so, as regards the legality of reprisals by a third State against a wrongdoing State, the case is inconclusive, if not irrelevant.

Writers who argue that third States may take reprisals cite only one piece of State practice in support of their views—the joint intervention in China to crush the Boxer rising in 1900.<sup>1</sup> But all the States which took part in the intervention had legations in Peking which were being attacked by the Boxers,<sup>2</sup> so this incident is an example of joint intervention by several injured States, rather than of intervention by third States.

In 1904 President Roosevelt of the United States said:

Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power . . . We would interfere with them [i.e. Latin American countries] . . . only if . . . their inability or unwillingness to do justice at home and abroad had violated the rights of the United States or had invited foreign [sc. European] aggression to the detriment of the entire body of American nations.<sup>3</sup>

The Roosevelt corollary to the Monroe Doctrine, as it came to be called, was not based on the general idea that an obligation owed by one State [Latin American] to another [European] could be legally enforced by a third State [the United States]; rather, it was based on the United States' extra-legal hegemony over Latin America, and on its determination to prevent European States from using debt-collecting interventions as a pretext for acquiring political power in Latin America (as France had tried to do in Mexico in Maximilian's time, for instance). In short, the justification for the Roosevelt corollary was political, not legal.

A better example of reprisals by third States is the Armed Neutralities of 1780 and 1800. The States participating in the Armed Neutralities

<sup>1</sup> See the works by Hodges and Hall referred to above, p. 1 n. 3, and p. 2 n. 1, respectively.

<sup>2</sup> P. Fleming, *The Siege at Peking* (1959). Compare the list on p. 182 with the map facing p. 113.

<sup>3</sup> *Foreign Relations of the United States* (1904), pp. xli–xlii.



concluded treaties among themselves, which provided that, if a merchant ship belonging to one of them was illegally seized by a belligerent, all the States parties to the treaty would take reprisals against the belligerent.<sup>1</sup>

### *Collective Self-Defence and Qualified Neutrality*

Article 51 of the United Nations Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs . . .

Under the right of collective self-defence, a State may defend another State against attack, even though the attack on the second State does not endanger the first State.<sup>2</sup> Article 51 says that this right is 'inherent', which clearly suggests that it exists independently of the Charter, as a right under customary law.<sup>3</sup> Moreover, since the 1920s there has been a growing acceptance of the principle that the use of force is, with certain exceptions, illegal. When State A attacks State B and State C defends State B, the military action taken by State C against State A would normally be illegal, and is only justified by State A's illegal use of force against State B. Can it not be argued that the inherent right of collective self-defence is thus a form of reprisals by a third State, which is justified not only by the United Nations Charter, but also by customary law? And, if customary law permits reprisals by third States against one type of illegal act, why should it not permit reprisals against other types of illegal acts?

The trouble with this argument is that it is historically unsound. The right of collective self-defence existed (albeit under different names) long before international law made any serious attempt to limit the right of States to use force. In the nineteenth century one State could defend another State against attack, regardless of whether or not the attack was an

<sup>1</sup> J. B. Scott, *The Armed Neutralities of 1780 and 1800* (1918), pp. 303, 315, 400, 443, 535, 541, 548.

<sup>2</sup> D. W. Bowett, *Self-Defence in International Law* (1958), chapter 10, argues that one State may defend another State only when the first State's own rights or interests are threatened by the attack on the second State. But State practice lends no support to Dr. Bowett's restrictive interpretation of collective self-defence. Under the North Atlantic Treaty and similar treaties, each party undertakes to defend every other party against attack, and this undertaking is not limited to circumstances where an attack on one party threatens the rights or interests of another party.

A lot of confusion has been caused by the supposed illogicality of 'self-defence' of another State. This confusion does not exist in the French text, which uses the term 'légitime défense'.

<sup>3</sup> This is an important point. Many treaties contain provisions authorizing the contracting parties to impose various forms of sanctions on States which break the treaty (e.g. Articles 39-42 of the United Nations Charter, and Articles 10, 11 and 16 of the League of Nations Covenant), and there is nothing to suggest that such provisions are evidence of customary law. The use of the word 'inherent' in Article 51, however, makes it clear that the right mentioned in Article 51 exists under customary law.

See also below, pp. 6-7, concerning the preamble to the Kellogg-Briand Pact.

illegal act. Indeed, defence and attack shared the same legal justification—the absence of any general rule prohibiting the use of force.

Since the First World War, international law has greatly limited the right of States to use force. But it has not taken away a State's right to use force to repel an attack against itself or against another State. When Article 51 describes self-defence as an inherent right, it implies that this is a right which States have always had and never lost. Article 51 is a reservation, not a grant. It may be that Article 51 restricts the circumstances in which the right of self-defence may be exercised. But even the most literal interpretation of the words 'if an armed attack occurs' would not justify the insertion of the word 'illegal' before the words 'armed attack'.<sup>1</sup> In the nineteenth century the legality of the use of force by one State to defend another State against an armed attack was not conditional upon the illegality of the armed attack; and it is submitted that that position remains unchanged today.

The modern rules against the use of force are so comprehensive that it is difficult to think of examples of an armed attack which would not be illegal.<sup>2</sup> But action justified by the 'enemy States clauses' (Articles 53 (2) and 107) of the United Nations Charter is probably a good example. Blue-land is entitled to defend a former enemy State against an attack by Red-land, even if Red-land's attack is justified by Article 107 of the Charter. Here we have a survival of the nineteenth-century position, where international law does not prohibit the use of force by either side. Such a state of affairs makes nonsense of the determination, enunciated in the preamble to the Charter of the United Nations, 'to save succeeding generations from the scourge of war', but the opening words of Article 51 ('Nothing in the present Charter shall impair the inherent right . . .') and of Article 107 ('Nothing in the present Charter shall invalidate or preclude action . . .') make it clear that the scope of application of these Articles cannot be curtailed in order to reconcile them with other provisions of the Charter (or even to reconcile them with one another). Probably the only solution is to maintain, as the Western Powers do, that the 'enemy States clauses' were intended to be transitional provisions and are now no longer valid. Even

<sup>1</sup> It is true that the French text speaks of 'agression armée', and aggression is, virtually by definition, illegal. But the Spanish text 'en caso de ataque armada' is closer to the English text.

<sup>2</sup> If A attacks B, and if C, in order to defend B, launches a diversionary attack against A, D cannot claim that C's attack on A constitutes an armed attack within the meaning of Article 51, which would entitle D to defend A against C. If D defends A, D is acting as an accomplice to an aggressor, and is therefore acting unlawfully. Cf. G.A. Resolution 498 (V) of 1 February 1951, condemning Communist China for helping North Korea against the United Nations force in Korea: *Yearbook of the United Nations* (1951), pp. 244-5.

In this situation, C's armed attack is lawful, but D has no right of collective self-defence. Such a situation is therefore irrelevant to the problem discussed in the text above, which is concerned with *lawful* defence against a lawful armed attack.



so, there must *at one time* have been a possibility of States' lawfully fighting in collective self-defence against an armed attack which was lawful by virtue of Article 107. This possibility, even if it belongs to the immediate post-war years, suffices to demonstrate that collective self-defence *can* be directed against legal armed attacks as well as against illegal armed attacks. And this in turn shows that collective self-defence is not a good example of reprisals by third States; for reprisals are, by definition, legal only if they are directed against a State which has acted illegally.

The idea of qualified neutrality is a much better example of reprisals by third States. Under the traditional law, States which did not participate in a war had to obey the rules of neutrality. In 1940 and 1941, however, the United States broke the rules of neutrality in order to help the United Kingdom (e.g. by the 'lend-lease' scheme), and justified her action on the grounds that Germany's attack on Poland, which started the war, was itself illegal. The general view nowadays is that neutral States are entitled to disregard their obligations as neutrals *vis-à-vis* aggressor States, simply because aggression is illegal.<sup>1</sup> This is a true example of reprisals by third States—States which are not directly affected by a breach of international law invoke that breach as a justification for treating the law-breaking State in a manner which would in normal circumstances be illegal.

### *Termination or Suspension of Treaties as a Result of their Breach*

If a State commits a serious breach of a bilateral treaty, the other party to the treaty may denounce or suspend it. If a State commits a serious breach of a multilateral treaty, it seems logical that a party directly injured by the breach should be entitled to retaliate by withholding the benefit of the treaty from the delinquent State (provided it can do so without affecting the rights of the other parties to the treaty). But may other parties to the treaty, who are not directly affected by its breach, also withhold the benefit of the treaty from the delinquent State?

The preamble to the Kellogg-Briand Pact of 1928 provides, *inter alia*:

... any signatory Power which shall hereafter seek to promote its interests by resort to war should be denied the benefits furnished by this Treaty . . .

This must surely mean that all the parties to the Pact, whether they are directly affected by its breach or not, may withhold the benefit of the Pact from the delinquent State. Oppenheim comments:

This is merely an affirmation of the rule that a State is entitled to cancel a treaty broken by the other party.<sup>2</sup>

<sup>1</sup> L. Oppenheim, *International Law*, vol. 2 (7th ed. by H. Lauterpacht, 1952), pp. 637–52.

<sup>2</sup> *Ibid.*, p. 191.

Similar views were expressed in the French Chamber of Deputies during the debates preceding the ratification of the Pact.<sup>1</sup> On the other hand, Secretary of State Kellogg wrote to several governments during the negotiations leading up to the Pact:

There can be no question that violation of a multilateral anti-war treaty through resort to war by one party would automatically release the other parties from their obligations to the treaty-breaking State. Any express recognition of this principle of law is wholly unnecessary.<sup>2</sup>

Kellogg did not say that this principle applied to the violation of all treaties; he merely said that it applied to the 'violation of a multilateral anti-war treaty'—which may (or may not) be significant.

Similar problems have arisen concerning the effects of the breach of treaties regulating the conduct of hostilities. On this point, Fauchille writes:

Si on suppose une guerre dans laquelle paraissent de chaque côté plusieurs alliés, on<sup>3</sup> a dit que chaque belligérant ne peut relever contre l'adversaire que les infractions à la convention dont il a lui-même souffert et non pas celles dont a souffert son allié.

However, he rejects this view:

Une guerre poursuivie en des lieux divers étant toujours la même guerre et devant être réglée par les mêmes lois, l'inexécution d'un traité sur l'un des théâtres de la lutte ne le laisse pas intact pour les autres régions où s'accomplissent les hostilités.<sup>4</sup>

Similarly, in *The Blonde*, the Privy Council had to decide whether the Sixth Hague Convention of 1907 had ceased to apply between the United Kingdom and Germany as a result of German breaches of other Hague Conventions during the First World War, and it considered all sorts of German breaches, including some (e.g. deportation of civilians from occupied territory) which by their very nature could only have been committed against the United Kingdom's allies and not against the United Kingdom itself.<sup>5</sup> The Privy Council's attitude is sensible, because in wartime the interests of allies are so intertwined that any act which injures one ally is almost bound to weaken the war effort of the alliance as a whole.

However, the French Government appears to take an even broader view. When signing the Geneva Gas Protocol in 1925, France made the following reservation:

The said Protocol shall ipso facto cease to be binding on the government of the

<sup>1</sup> A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. 1 (1962), pp. 114–15.

<sup>2</sup> G. H. Hackworth, *Digest of International Law*, vol. 5 (1943), p. 345.

<sup>3</sup> Fauchille does not explain to whom 'on' refers.

<sup>4</sup> P. Fauchille, *Traité de droit international public*, vol. 1, part 3 (1926), pp. 389–90.

<sup>5</sup> [1922] 1 A.C. 313, 329–30. See also L. Oppenheim, *International Law*, vol. 2 (7th ed., by H. Lauterpacht, 1952), p. 562 n. 1 (French bombardment of undefended German towns during the First World War as a reprisal against German bombardment of French and English undefended places).

French Republic in regard to any enemy State whose armed forces or whose allies fail to respect the prohibitions laid down in the Protocol.

So, if Germany (or one of Germany's allies) had used gas against France (or, apparently, against one of France's allies), France would have been entitled to take reprisals against Germany. Defending the reservation in the Security Council, the French representative regarded it as an expression of a general principle applying not only to treaties regulating the conduct of war, but to all treaties:

La violation d'un engagement par l'un de ses signataires libère les autres signataires des obligations qu'ils ont pu contracter à son égard.<sup>1</sup>

Apart from the special cases of treaties prohibiting or regulating the use of force, there is little authority on the problem under discussion. McNair's *Law of Treaties*, for instance, does not mention it at all. Article 27 of the Harvard Research Draft Convention on the Law of Treaties provides:

(a) If a State fails to carry out in good faith its obligations under a treaty, *any other party* to the treaty . . . may seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such State.

(b) Pending agreement by the parties upon and a decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty vis-à-vis the State charged with failure.<sup>2</sup>

On the other hand, Acting Attorney-General Biddle took a narrower view when advising the United States in 1941 about the suspension of the International Load Line Convention of 1930:

Violation of a treaty by one contracting party renders the treaty voidable at the option of another contracting party *injured* by the violation.<sup>3</sup>

This problem did not arise until a comparatively late stage of the International Law Commission's work on the law of treaties. Fitzmaurice's reports, for instance, spoke of the other parties to a multilateral treaty withholding the benefits of the treaty from a treaty-breaking State, without making it clear whether the other parties were supposed to act jointly or severally.<sup>4</sup>

<sup>1</sup> A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. 1 (1962), p. 115.

<sup>2</sup> *American Journal of International Law*, 29 (1935), Supplement, p. 662 (italics added). See also Quincy Wright, 'Collective Rights and Duties for the Enforcement of Treaty Obligations', *Proceedings of the American Society of International Law* (1932), pp. 101, 111.

<sup>3</sup> G. H. Hackworth, *Digest of International Law*, vol. 5 (1943), p. 345 (italics added).

<sup>4</sup> *Year Book of the International Law Commission* (1957-II), pp. 31, 54-5; *ibid.* (1959-II), p. 50.



The Commission's 1963 draft provided, in paragraph 2 of Article 42:

A material breach of a multilateral treaty by one of the parties entitles:

(a) *Any other party* to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties by common agreement either:

(i) to apply to the defaulting State the suspension provided for in sub-paragraph

(a) above; or

(ii) to terminate the treaty or to suspend its operation in whole or in part.<sup>1</sup>

Paragraph 2 (b) aroused no opposition, despite the fact that there was apparently no precedent for it in the pre-existing customary law, and emerged, after various redrafts, as part of Article 60 (2) of the Vienna Convention, 1969:

A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) . . .

Paragraph 2 (a), on the other hand, was criticized by the Netherlands and United States Governments. The Netherlands Government pointed out that the Commission's commentary on Article 42 (2) of its 1963 draft stated:

It was necessary to visualize two possible situations: (a) an individual party *affected by the breach* might react alone; or (b) the other parties to the treaty might join together in reacting to the breach.<sup>2</sup>

The Netherlands Government commented:

. . . the Commission's intention, which is clear from . . . its commentary, is not quite realized in paragraph 2 (a) of the above article . . . Paragraph 2 (a) could be clarified by modifying the texts . . . [to read:] 'Any other party, whose rights or obligations are adversely affected by the breach . . .'<sup>3</sup>

Similarly, the United States Government said:

The paragraph [i.e. paragraph 2 of Article 42] seems to a certain extent to ignore the differing varieties of multilateral treaties. Paragraph 2 could well be applied to law-making treaties on such matters as disarmament, where observance by all the parties is essential to the treaty's effectiveness. But we question whether a multilateral treaty such as the Vienna Convention on Consular Relations—which is essentially bilateral in its application—should be subjected to the provisions of paragraph 2 as it is now worded. Let us take an example. If party A refuses to accord to party B the rights set forth in the Consular Conventions, should parties X, Y and Z—in addition to party B (the injured party)—have the right to treat the Convention as suspended or no longer in force between themselves and party A? . . . [In that case] article 42 could have an undesirable effect.

<sup>1</sup> Ibid. (1963-II), p. 204 (italics added).

<sup>2</sup> Ibid., p. 205 (italics added).

<sup>3</sup> Ibid. (1966-II), p. 318.

Termination or suspension in the case of a multilateral treaty should follow the rule applicable to bilateral treaties. That is, an injured party should not be required to continue to accord rights illegally denied to it by the offending party.

The United States Government therefore suggested the same amendment as the Netherlands Government had suggested.<sup>1</sup>

In his fifth Report to the Commission, Sir Humphrey Waldock tried to take account of these criticisms:

The Netherlands Government is certainly correct in thinking that paragraph 2 (a) is intended to refer primarily to the rights of parties whose own interests are affected by the breach . . . The Commission, it is believed, assumed that, since paragraph 2 (a) authorizes suspension of the operation of the treaty only bilaterally as against the offending State, only a party whose own interests are affected by the breach would be likely to wish to exercise the right provided for in this paragraph. However, if it is really thought—as the Netherlands and United States Governments appear to think—that the right provided for in paragraph 2 (a) may be abused by a party not itself directly affected but anxious to find a pretext for suspending the operation of the treaty vis-à-vis the particular offending State, little objection is seen to limiting paragraph 2 (a) specifically to parties whose interests are affected by the breach.

However, he thought that the reference to rights and obligations in the amendment suggested by the Netherlands and United States Governments was too restrictive, since ‘the interests of one party may be seriously affected by the violation of the rights of another party’. He therefore suggested that paragraph 2 should be redrafted to read:

A material breach of a multilateral treaty by one of the parties entitles:

(a) Any other party whose interests are affected by the breach to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state;

(b) . . .<sup>2</sup>

The relevant parts of Sir Humphrey Waldock’s fifth Report were criticized at the 831st meeting of the Commission on 14 January 1966. One of the most trenchant critics was Shabtai Rosenne:

On the point raised by the United States and Netherlands Governments, he doubted the validity in law of the distinction which those Governments attempted to draw . . .

<sup>1</sup> *Year Book of the International Law Commission* (1966-II), p. 354.

<sup>2</sup> *Ibid.*, pp. 35–6. He also proposed a new paragraph 2 (*bis*), which reads: ‘Notwithstanding paragraph 2, if the provision to which the breach relates is of such a character that its violation by one party frustrates the object and purpose of the treaty generally as between all the parties any party may suspend the operation of the treaty with respect to itself or withdraw from the treaty.’ This paragraph was intended to deal with a very special class of treaties, such as disarmament treaties, and has more in common with the *rebus sic stantibus* doctrine than with the traditional idea of discharge through breach. It subsequently became part of Article 60 (2) of the Vienna Convention, 1969: ‘A material breach of a multilateral treaty by one of the parties entitles: . . . (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.’



between an interested party whose rights and obligations were affected by the breach, and other parties to the treaty . . . The concept of a 'legal interest' was extremely ill-defined . . . As a matter of principle, he felt strongly that all parties to a multilateral treaty had the same interest with regard to the observance of a treaty . . .

This was shown, he said, by Article 63 of the Statute of the International Court of Justice,<sup>1</sup> as well as by some of the Commission's draft articles on the law of treaties, which provided that certain acts arising out of the application of a treaty must be notified to *all* the contracting States. For these reasons, he preferred the wording of the 1963 draft.<sup>2</sup> He was supported by Castrén and Briggs.<sup>3</sup>

Verdross agreed with Rosenne about the imprecision of the word 'interests', but suggested a very different solution:

. . . he agreed with Mr. Rosenne that each of the parties to a multilateral treaty had an interest in the observance of the treaty. A breach of the treaty might affect the rights of one particular party more specifically, but it undoubtedly prejudiced the interests of all the parties. Consequently, the word 'interests', in paragraph 2, should be replaced by the word 'rights'.<sup>3</sup>

Yasseen said that every party to a multilateral treaty had an interest in the observance of the treaty by all the parties. But he went on:

Apart from that general interest, however, a party might have a more specific interest in seeing that another party fulfilled towards it the obligations laid down in the treaty. Treaties which, in a multilateral form, regulated what were essentially bilateral relations—for example, the Vienna Convention on Consular Relations—demonstrated both the general interest of the parties in the observance of the treaty, and the particular interest of each party in seeing that its own rights under the treaty were respected. That idea was reflected in paragraph 2 as redrafted, but he hoped that it would be expressed even more clearly.<sup>4</sup>

<sup>1</sup> Article 63 reads as follows:

'1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

2. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.'

But *locus standi* in litigation arising out of a multilateral treaty is not necessarily accompanied by a right to take reprisals. For instance, Article 24 of the European Convention on Human Rights provides: '*Any High Contracting Party* may refer to the Commission . . . any alleged breach of the provisions of the Convention by another High Contracting Party' (italics added). Moreover, the High Contracting Party which referred the case to the Commission also has *locus standi* to bring the case before the European Court of Human Rights (Article 48). But, if State A breaks the European Convention on Human Rights, it is unthinkable that another State would be entitled to retaliate by withholding the benefit of the Convention from the nationals of State A. Article 60 (5) of the Vienna Convention on the Law of Treaties provides that the ordinary rules about the termination or suspension of the operation of a treaty as a consequence of its breach 'do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character . . . '.

<sup>2</sup> *Year Book of the International Law Commission* (1966-I), part 1, p. 60. The draft articles to which Dr. Rosenne referred have now become Articles 22 (1) and 77 (2) of the Vienna Convention, 1969.

<sup>3</sup> *Ibid.*, p. 61.

<sup>4</sup> *Ibid.*, p. 62.

Cadieux was of the same opinion.<sup>1</sup> De Luna said that he

. . . agreed with Mr. Yasseen's remarks concerning paragraph 2. The word 'rights' would be better than the word 'interests', for whereas all the parties to a multilateral treaty had an interest, only some had a subjective right . . .<sup>2</sup>

In the end, paragraph 2 of Article 42 was referred to the Drafting Committee 'for reconsideration in the light of the discussion'.<sup>3</sup> The Drafting Committee produced the following draft:

A material breach of a multilateral treaty by one of the parties entitles:

(a) The other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either:

- (i) in the relations between themselves and the defaulting State, or
- (ii) as between all the parties;

(b) A party *specially affected* by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) . . .<sup>4</sup>

Sir Humphrey Waldock explained that

. . . the order of sub-paragraphs (a) and (b) in paragraph 2 had been reversed in order to emphasize the different degrees of interest that parties might have in the observance of a treaty.<sup>5</sup>

The new paragraph 2 (b) was accepted unanimously. Even Shabtai Rosenne, who had led the opposition

. . . to the reference in the Special Rapporteur's new text<sup>6</sup> . . . to the interests of a party being affected by a breach, . . . found the Drafting Committee's text of paragraph 2 (b) satisfactory.<sup>7</sup>

This may indicate a change of mind on his part; or it may indicate that his earlier criticisms were not really directed against the substance of Sir Humphrey Waldock's fifth Report, but against the ambiguity of the word 'interests'. The Drafting Committee's text of paragraph 2 (b) was accepted without change as Article 60 (2) (b) of the Vienna Convention, 1969.

As often happens, it is difficult to tell whether Article 60 (2) (b) of the Vienna Convention represents a codification or a progressive development of the law; apart from anything else, the evidence of pre-existing customary law is scanty and contradictory. But for this very reason it is to be hoped that Article 60 (2) (b) will be accepted as an authoritative statement of the modern customary law, otherwise there could be a serious gap or uncertainty in the law.

<sup>1</sup> *Year Book of the International Law Commission* (1966-I), part I, p. 62.

<sup>2</sup> *Ibid.*, p. 63.

<sup>3</sup> *Ibid.*, p. 67.

<sup>4</sup> *Ibid.*, pp. 127-8 (italics added).

<sup>5</sup> *Ibid.*, p. 128. Cf. the ideas expressed by Yasseen and Cadieux, above, p. 11.

<sup>6</sup> See above, p. 10.

<sup>7</sup> *Year Book of the International Law Commission* (1966-I), part I, p. 128.

*Enforcement of Judicial Decisions*

The *Monetary Gold* case arose out of Albania's refusal to pay the damages awarded to the United Kingdom by the International Court of Justice in the *Corfu Channel* case.<sup>1</sup> Gold, apparently of Albanian origin, which had been looted by Germany during the Second World War, came into the hands of a Tripartite Commission composed of the United States, the United Kingdom and France, which had been set up after the war to restore gold looted by Germany to its rightful owners. The three States composing the Tripartite Commission agreed among themselves that Albanian gold should not be returned to Albania, but should be given to the United Kingdom as part payment of the damages owed by Albania to the United Kingdom, unless Italy, which also claimed an interest in the gold, could prove a better title. In proceedings brought by Italy against the members of the Tripartite Commission before the International Court of Justice, Sir Gerald Fitzmaurice, who was at that time Legal Adviser to the Foreign Office, defended the Commission's action in the following words:

It must . . . be a matter of importance to the family of nations . . . that the judgments of the highest international tribunal . . . should be respected and carried out. It cannot fail to be prejudicial to the international community and to the rule of law in international relations if the judgments of international tribunals . . . are . . . disregarded. . . . [A]ll countries are, if not bound, at any rate entitled to take all such reasonable and legitimate steps as may be open to them to prevent such an occurrence, and either individually or by common action to do what they can to ensure that judgments . . . are . . . carried out . . .

On account of the fact that there was an outstanding judgment of the Court against Albania in favour of the United Kingdom which had never been satisfied, and in view of the general interest, and, indeed, within certain limits, duty, which all countries can be regarded as having to further the implementation of the Court's judgments—it would have been possible on these grounds for the three Governments to direct that the share attributable to Albania in the Gold Pool should be transferred to the United Kingdom . . .<sup>2</sup>

If an individual loots property and a State knowingly keeps that property without paying compensation, the State is liable for the value of the property.<sup>3</sup> Logically, the same rule must apply where a State keeps property looted by another State. The members of the Tripartite Commission would, in normal circumstances, have been acting unlawfully if they had kept Albanian gold for themselves. What Sir Gerald Fitzmaurice was really arguing was that Albania's illegal refusal to pay the damages awarded in the *Corfu Channel* case to the United Kingdom justified not only the

<sup>1</sup> *I.C.J. Reports*, 1949, p. 4.

<sup>2</sup> *I.C.J. Pleadings: Case of the Monetary Gold Removed from Rome in 1943* (1954), pp. 126, 131.

<sup>3</sup> *Mazzei's claim* (1903), *Reports of International Arbitral Awards*, vol. 10, p. 525.



United Kingdom, but also France and the United States, in committing what would normally have been an illegal act. This is a clear case of reprisals by third States.

The International Court of Justice held that it had no jurisdiction, and therefore did not rule on the merits of the case.<sup>1</sup> But the action taken by the members of the Tripartite Commission, and the arguments used by Sir Gerald Fitzmaurice to defend that action, have been approved by a number of commentators,<sup>2</sup> who regard them as constituting a valid precedent in State practice which could be relied upon in subsequent cases concerning the enforcement of judicial (and presumably arbitral) decisions.

### *Conclusion*

Some writers suggest that third States must have a right to take reprisals if international law is to be effective. Stowell, for instance, says that a weak State's rights would be worthless if strong States were not able to intervene to protect it.<sup>3</sup> Root says that all States derive a benefit from the existence of international law, and that all States therefore ought to have a right to take action in order to prevent serious violations of the law:

International laws violated with impunity must soon cease to exist, and every State has a direct interest in preventing those violations which, if permitted to continue, would destroy the law.<sup>4</sup>

If reprisals by third States were as necessary for the effectiveness of international law as these statements suggest, one would expect to find frequent references to the subject in the records of State practice; either third States would actually take reprisals, or at least there would be constant arguments about the expediency and legality of such reprisals. But, apart from isolated exceptions,<sup>5</sup> the records of State practice are silent in this context. Whatever else such silence may or may not prove, it must surely indicate that reprisals by third States are not so essential for the effectiveness of international law as writers like Stowell and Root suggest. Third States can, after all, exercise considerable pressure on law-breaking

<sup>1</sup> *I.C.J. Reports*, 1954, p. 19.

<sup>2</sup> C. W. Jenks, *The Prospects of International Adjudication* (1964), pp. 703-6; S. Rosenne, *The International Court of Justice* (1957), pp. 97-102; S. Rosenne, *The Law and Practice of the International Court* (1965), pp. 142-8; O. Schachter, 'The Enforcement of International Judicial and Arbitral Decisions', *American Journal of International Law*, 54 (1960), p. 1.

T. C. Oliver, 'The Monetary Gold Decision in Perspective', *ibid.* 49 (1955), p. 216, takes the opposite view, but on the narrow grounds that the members of the Tripartite Commission owed a fiduciary obligation towards Albania by virtue of the agreement setting up the Commission.

<sup>3</sup> E. C. Stowell, *Intervention in International Law* (1921), p. 46.

<sup>4</sup> E. Root, 'The Outlook for International Law', *Proceedings of the American Society of International Law* (1915), pp. 2, 9. See also L. Oppenheim, *International Law*, vol. 1 (8th ed. by H. Lauterpacht, 1955), pp. 13-14, and the statements by Vattel and Hall, cited above, pp. 1-2.

<sup>5</sup> See below, p. 15.

States in other ways—by making protests<sup>1</sup> or by indulging in retorsion (although it is worth noting that retorsion is seldom used by States unless their own interests are directly affected by the actions of another State).<sup>2</sup> In any case, sanctions are not the main reason why States obey international law,<sup>3</sup> so it does not matter very much if third States are debarred from taking reprisals.

In general, reprisals are taken only by the State 'specially affected' (to borrow the words of Article 60 (2) (b) of the Vienna Convention, 1969). The circumstances in which third States have claimed a power to take reprisals are virtually limited to three main categories:

- (i) enforcement of judicial decisions;<sup>4</sup>
- (ii) Article 60 (2) (a) of the Vienna Convention, 1969;<sup>5</sup>
- (iii) violation of rules prohibiting or regulating the use of force.<sup>6</sup>

Are these categories examples of a general rule *permitting* third States to take reprisals? Or are they exceptions to a general rule *forbidding* third States to take reprisals?

There is a long line of doctrinal opinion, stretching back to Grotius, which maintains that third States have a general right to take reprisals. But the very longevity of this school of thought casts doubt on its validity; writers seem to have reproduced what earlier writers wrote, without citing any authority or producing any convincing arguments. In any case, there are many other writers who disagree with this school of thought.<sup>7</sup>

In fact, there are sound policy reasons for considering that third States are not, as a general rule, allowed to take reprisals. In international disputes of a legal character, *both* sides usually accuse each other of breaking international law; if third States were able to intervene, there is a serious danger that they would be biased and that they would tend to support their allies, rather than the side which was objectively in the right. The result would be more likely to weaken international law than to

<sup>1</sup> Cf. the protests by France, Prussia, Austria and Italy over the seizure by the United States of two Confederate agents from the British steamship *Trent* on the high seas in 1861: *American Journal of International Law*, 33 (1939), Supplement, pp. 790–2.

<sup>2</sup> For instance, amendments to the [United States] Foreign Assistance Acts oblige the President to withhold aid from States which unlawfully expropriate the property of *United States nationals* *ibid.* 57 (1963), p. 749), and authorize him to withhold aid from States which unlawfully impose penalties on *United States fishing vessels* for fishing on the high seas: *International Legal Materials*, vol. 4 (1965), p. 1054. However, the so-called 'Sabbatino amendment' to the Foreign Assistance Acts directs United States courts to disregard the Act of State doctrine in cases concerning the illegal expropriation of property by foreign States—regardless of whether the property was owned by United States nationals or by the nationals of third States: *American Journal of International Law*, 59 (1965), p. 899.

<sup>3</sup> L. Henkin, *How Nations Behave* (1968), pp. 45–64; M. B. Akehurst, *A Modern Introduction to International Law* (1970), pp. 16–22.

<sup>4</sup> See above, pp. 13–14.

<sup>5</sup> See above, p. 9.

<sup>6</sup> See above, pp. 3–4 (concerning the Armed Neutralities of 1780 and 1800) and 6–8.

<sup>7</sup> See above, pp. 1–2.



strengthen it; and it would certainly cause a very disturbing increase in international tension.

What about the three exceptional categories mentioned above,<sup>1</sup> where third States claim a right to take reprisals? Can they be justified as exceptions to a general rule forbidding reprisals by third States?

First, in the case of enforcement of judicial decisions,<sup>2</sup> the danger of abuse by biased third States, which is the main reason for denying third States a general right to take reprisals, is virtually eliminated by the fact that the original cause of the dispute has already been dealt with by the judgment of an impartial tribunal. The question whether that judgment has been performed is usually such a simple question of fact that there can seldom be room for a difference of opinion about the answer. (This is true, at any rate, of judgments condemning one State to pay damages to another, as in the *Corfu Channel* case;<sup>3</sup> when the judgment imposes more subtle obligations on the parties, as in the *North Sea Continental Shelf* cases,<sup>4</sup> there is an increased possibility of differences of opinion (and consequently of biased assessments by third States) about whether a State has complied with the judgment. One solution to this problem would be for international tribunals to make sure that their judgments always impose *precise* obligations on the parties; but that raises questions which go beyond the scope of the present study.)

The second exception, Article 60 (2) (a) of the Vienna Convention, is more apparent than real, because it is doubtful whether Article 60 (2) (a) reflects the customary law on the subject.<sup>5</sup> In any case, the requirement of unanimity, stipulated in Article 60 (2) (a), will, in almost all cases, obviate those dangers of abuse by biased third States which constitute the main reason for denying third States a more general right to take reprisals.

The justification for the third exception—violation of rules prohibiting or regulating the use of force<sup>6</sup>—is more complicated.

If we accept that the ultimate purpose of all law is to safeguard human life and happiness, then it is obvious that rules designed to eliminate war or to limit its destructiveness are the most important rules of international law; for war can cause more death and misery than any other human action. In the eighteenth and nineteenth centuries the rules of neutrality did something to prevent States from being dragged into wars against their will, and the laws of war lessened the sufferings of war for the armed forces and civilian populations of the belligerent States. In the present century the rules of neutrality and the laws of war have been complemented by rules which seek to forbid wars altogether. Rules prohibiting the use of

<sup>1</sup> See above, p. 15.

<sup>2</sup> See above, pp. 13-14. The same arguments apply to enforcement of arbitral decisions.

<sup>3</sup> *I.C.J. Reports*, 1949, p. 4.

<sup>4</sup> *Ibid.*, 1969, p. 3.

<sup>5</sup> See above, p. 9.

<sup>6</sup> See above, pp. 3-4 and 6-8.

force and rules regulating the use of force are of supreme importance, and anything—such as reprisals by third States—which serves to ensure compliance with those rules is to be welcomed.

If third States have a right to take reprisals, there is a danger that the right will be abused by biased third States, and this danger is as great (if not greater) in the context of rules prohibiting or regulating the use of force as it is in other contexts. But the rules in question are so important that it can be argued that this is a risk worth taking in order to make the rules more effective. Moreover, if reprisals by third States and other sanctions do not make those rules effective, it is doubtful whether anything can make them effective; fear of sanctions plays a greater role in securing compliance with rules prohibiting or regulating the use of force than it does in securing compliance with other rules of international law. A State which is engaged in hostilities, or which is on the brink of hostilities, is usually so passionately preoccupied with the actual or impending hostilities that it is beyond the reach of those processes of calm negotiation and friendly persuasion which in peacetime are so often effective in inducing law-breaking States to reconsider their position and to make some reparation for their breaches of the law. In any case, violations of rules prohibiting or regulating the use of force differ from violations of most other rules of international law in the sense that they can do widespread and irreparable damage in a very short period of time, and something swifter than negotiation and persuasion is needed to remedy the situation.

In 1915 Elihu Root made an interesting comparison between municipal law and international law. Minor breaches of municipal law, he said, are regarded as a matter of civil law, concerning no one but the two parties involved. He continued:

On the other hand, certain flagrant wrongs the prevalence of which would threaten the order and security of the community are deemed to be everybody's business. If, for example, a man be robbed and assaulted, the injury is deemed not to be done to him alone, but to every member of the State by the breaking of the law against robbery or against violence. Every citizen is deemed to be injured by the breach of the law because the law is his protection, and if the law be violated with impunity his protection will disappear. Accordingly, the government, which represents all its citizens, undertakes to punish such action even though the particular person against whom the injury was done may be content to go without redress. Up to this time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it . . .

If international law is to be binding [*sic*], . . . there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation.<sup>1</sup>

<sup>1</sup> E. Root, 'The Outlook for International Law', *Proceedings of the American Society of International Law* (1915), pp. 2, 8-9.

Whatever the position may have been in 1915, the difference between municipal law and international law in this respect is nowadays less than Root suggested. Breaches of the rules of international law prohibiting or regulating the use of force do give rise to criminal liability. (This by itself demonstrates the importance of such rules, because criminal liability attaches to the breach of very few other rules of international law.) Every State may try individuals who break such rules. The exercise of this jurisdiction may be justified on the grounds that every State has a legal interest in the universal maintenance of rules prohibiting or regulating the use of force; people who commit war crimes or crimes against peace are, like the pirates in days of old, *hostes humani generis*. And can it not be argued that the same legal interest justifies every State in taking reprisals against States which commit similar crimes?



# INTERNATIONAL LAW AND CONTEMPORARY NAVAL OPERATIONS\*

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## I. INTRODUCTION

SINCE 1945 the law of war has tended to be neglected by international lawyers, partly, no doubt, because they have remained optimistic that war had been excluded from their doctrine, but partly too because many have lacked the technical knowledge to evaluate the military factors which bear upon the traditional rules of the law of war and test their viability.<sup>1</sup> To this extent they have failed to serve the military branches of government during a period in which hostilities short of war have been endemic, and when technology has rendered obsolete many of the tactics and situations

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<sup>1</sup> The post-1945 works which deal with the Law of War at Sea are: Tucker, *The Law of War and Neutrality at Sea* (United States Naval War College International Law Studies, 1957); Oppenheim, *International Law*, vol. 2, *Disputes, War and Neutrality* (7th ed. by Lauterpacht, 1952), pp. 457-514; Castren, *The Present Law of War and Neutrality* (1954), pp. 241-380; Colombos, *International Law of the Sea* (6th ed., 1967), pp. 477-626; Skubiszewski, in Sørensen, *Manual of Public International Law* (1968), Chap. 12 *passim*; Stone, *Legal Controls of International Conflict* (1954), pp. 571-607; Schwarzenberger, *International Law*, vol. 2, *The Law of Armed Conflict* (1968), pp. 361-433; Fenwick, *International Law* (4th ed., 1965), pp. 694-709; Berber, *Lehrbuch des Völkerrechts*, vol. 2, *Kriegsrecht* (1962), pp. 182-96; Verdross, *Völkerrecht* (5th ed., 1964), pp. 470-7; Scheuner, '“Seekriegsrecht” and Zemanek, “U-Boot Krieg” in Strupp-Schlochauer', *Wörterbuch des Völkerrechts* (1962); Schenk, *Seekrieg und Völkerrecht* (1958); Wengler, *Völkerrecht* (1964), vol. 2, pp. 1404-6, 1411 et seq., 1451 et seq.; Dahm, *Völkerrecht* (1960), vol. 2, pp. 430-4; Sereni, *Diritto internazionale* (1965), vol. 4, pp. 1997-8, 2037-70; Guggenheim, *Traité de droit international public* (1954), vol. 2, pp. 395-426. None of these has carried the discussion beyond the situation of 1945.



which the law of war encompassed. The result has been no little intellectual confusion on the part of military and naval planning staffs engaged in the struggle to write operational orders for situations of limited conflict, in a world where government policy is subjected to the scrutiny of the United Nations, and the conduct of operations must take into account other than military factors. The absence of dialogue between international lawyers and the defence services has been most obvious in the case of naval operations, perhaps because modern technology has carried the exercise of sea power beyond the conception of most laymen and made a mystery of naval operations. Seapower has rarely been understood in all its dimensions by international lawyers, along with most of the educated public, but there has never before been a time when the statements on international law in the textbooks have seemed less relevant to the naval officer groping for guidance. The technological revolution has required the services to examine every aspect of defence planning, and it has rendered evaluation of policy, weapons, tactics and logistics extremely difficult. No such examination or evaluation has been undertaken of the effect of the revolution upon the law of war. It must be undertaken, and the lawyers should not be apprehensive of the tentative nature of their conclusions, for all conclusions relating to matters of defence are at present necessarily provisional.

It is the purpose of this article to suggest some guidelines for an interchange of ideas between international lawyers and naval officers. The intention is not to propose definitive conclusions but tentatively to state a number of problems of seapower so that the naval planner may benefit from the perception of the lawyer, and the lawyer may have some awareness of the utility or otherwise of his traditional guidelines. To effect this dialogue it is necessary first to outline how international law questions become involved in the naval officer's routine work, and the procedure whereby they are inducted into operational orders. Then it is proposed to take a number of selected issues, wherein tactical changes brought about by the new technology have affected the viability of the traditional laws of war. In each section a statement of weapon capability and of tactical considerations will precede an analysis of the rules of law. It is believed that this method of stating the technological situation in order to apprehend the problem is necessary in so many areas of international law, where the rules need to be related to a radically altered environment.

The moment is opportune for such a preliminary investigation, for we have the experience of five modern naval involvements in situations of limited warfare, namely in Korea, in the Middle East, in the Confrontation of Malaysia and Indonesia, the Algerian emergency and in Vietnam; and there is now some valuable accumulated experience of international

legal problems concerning contemporary hostilities at sea. Also, the balance of seapower is changing, and with it strategic considerations are being revised. The Soviet Union, whose naval tradition has been defensive, has now grasped the significance of seapower and is confronting the responsibilities that accompany its exercise, while the Royal Navy is withdrawing from areas of the world which it traditionally policed, and leaving it to other nations, many of whom are of naval immaturity, to guarantee the freedom of the seas. So long as seapower remains a reality, rules of law to govern its exercise will be needed, and this is especially the case in circumstances of limited conflict, when neither party wishes to involve itself in war in the traditional sense, and hence manœuvres within the confines of a restricted system of understandings and undertakings.

## II. HOW INTERNATIONAL LAW AFFECTS NAVAL PLANNING

Maritime policy is the product of a focus of the interests of several government departments, and for this reason the planning and operational staffs of navies do not have a free hand in the making of decisions. The Directors of Plans and Operations will spend much of their time sitting on committees with representatives of other government departments, particularly the Foreign Ministry, perhaps the Ministry of Justice and Ministries concerned with transport, shipping, economic and fishery matters, the other services and the Treasury. Much diplomatic correspondence will be copied to them automatically, and if they are to be effective in their task, and are to ensure that the Navy has the capability of executing national policy, they must be able to speak with knowledge and authority on all aspects of seapower. Experience has demonstrated that many of the matters which they must consider are matters of international law, and to be equipped for their function they must have some formal background in the law of the sea, in the workings of the United Nations, in treaty law and in the machinery of international claims. They and their staffs must be familiar with claims to extended territorial seas and the legal evaluation thereof, and with the intricacies of the law relating to innocent passage, particularly through straits.

In this respect international lawyers have served the naval officer by providing guidance on the Geneva Conventions of 1958. But in other respects they have failed. For the naval planner must also envisage tactical situations so that he can devise weapons and the vessels to carry them to deal with such situations. In conditions of limited hostilities, or 'police actions'—which are the most likely naval operations of the immediate future—the situation clearly depends on the restrictions which the international community has succeeded in building into the exercise of seapower. International law then becomes relevant to the whole range of

naval planning and operations. May a submarine which traverses the territorial sea submerged be attacked by surface ships? Under what circumstances in time of political tension may a submarine which is detected in a tactical position in relation to a task force or convoy be attacked? There is limited value in writing operational orders which require the commander of an escort force to engage in continual anti-submarine search and to deploy the weapons necessary to deal with a contact if he is not told under what circumstances he may use his weapons. It is clear that a decision as to these circumstances involves questions of international law, and it is useless to postpone evaluation of these questions until the tactical situation actually arises. The event must be anticipated, and orders written which minimize the area of doubt in the tactical commander's mind when he decides to act.

Naval operational commanders are supplied with Rules of Engagement, which specify in detail the circumstances under which fire may be opened. In a situation such as that which has prevailed in Vietnam, Rules of Engagement necessarily make reference to concepts of international law, such as the territorial sea, the contiguous zone, hot pursuit, the avoidance of non-military damage and positive identification. Rules of Engagement, which emanate from a central naval authority, are supplemented by operational orders from the task-force commander, which on occasions may elaborate upon the concepts of international law which are utilized, in particular to specify the circumstances and conditions of visit and search, or the amount of force to be employed to terminate hot pursuit. Obviously the drafting of Rules of Engagement and operational orders presupposes some knowledge of the role of international law, and some appreciation of its concepts. But so does their interpretation by the operational commander to whom they are addressed. The purpose of these instruments is to minimize the area of doubt and thereby to circumscribe the freedom of action of the captain or task-force commander. Any lawyer knows that it is only when there is a common understanding of expressions of art, such as 'hot pursuit', that ambiguity is avoided, and it is arguable that the naval officer needs some formal education in international law if he is to be competent to interpret his orders accurately in conditions of limited hostilities.

This need is at present felt at all service levels, for junior officers in command of patrol boats engaged in fishery protection are as likely to involve their country in diplomatic incidents through a misinterpretation of the extent of their competence to act in respect of foreign vessels as are the commanders of major units of a fleet. It is not often realized that most of the questions concerning international law which arise for consideration by naval staffs do so as matters of ordinary administrative routine, and not



by way of diplomatic correspondence. Captains of ships or task-force commanders will seek direction on situations which confront them. Often the international legal point which they take is specious because it is propounded in ignorance and unless it can be answered quickly and competently much valuable administrative time is apt to be lost in dealing with the inquiry. At the staff level too, international legal questions arise when contingency plans are being formulated. A fleet staff will constantly be planning for all contingencies, or revising plans, so that when action is called for the fleet commander can inform his government immediately as to the courses available to it. If a course is proposed which a Foreign Ministry would rule out on grounds of international law, the exercise is abortive. Yet every contingency plan, involving as it does questions of logistics, is a major administrative task. An international lawyer thus plays a role in economizing on administrative time and resources by assessing the legality or otherwise of the plan, and hence the likelihood of its being acceptable to the political branch of Government which has to defend any action in the counsels of nations. Of course, final acceptance of any plan will depend on other considerations besides legal ones, such as the degree of urgency, and the likelihood of political or military challenge; and it must be recognized that the exercise of power, including seapower, is not necessarily conducted in a legal framework, though this is desirable, and is ordinarily politically convenient.

A legal officer competent in international law is thus becoming an indispensable component of naval staffs. Not all navies have recognized this, partly because they have not been immediately involved in situations of real tension. In the United States Navy fleet commanders carry on their staffs legal officers of high rank who constitute members of their inner cabinets, and whose function, apart from advising on disciplinary matters and collision cases, is to assess operational planning from the international law point of view. This is, therefore, an area of international legal practice unsuspected by the academic international lawyer, who has failed in this generation to provide this type of practitioner with the research and intellectual resources necessary for the satisfactory discharge of his duties. Since most naval legal officers have been trained only in disciplinary law, the level of special international legal competence in the fleet has not been high, and this implies a greater responsibility on the part of the professional international lawyers to do the intensive study which is necessary if the level of practitioner performance is to be raised.

### III. THE RULES OF INTERNATIONAL LAW IN LIMITED WAR

Declared war, and hence the legal condition of war, has not occurred since 1945, and upon an optimistic view of international relations and the



role of the United Nations is unlikely to occur in the near future. But the textbooks of international law distinguish only conditions of war and peace, not the condition of limited hostilities which has occurred, and unhappily will continue to occur.<sup>1</sup> The question that arises is how much of the traditional law of war at sea is applicable to this twilight situation which is neither peace nor war, and is unrecognized by many jurists. Article 2 of the Geneva Convention on the High Seas declares the high seas to be free for navigation, and Article 22 elaborates upon this by specifying that a warship is not justified in boarding a foreign merchant ship on the high seas unless there is reasonable ground for suspecting piracy, slave trading or that the ship, despite the flag it is wearing, is really of the same nationality as the warship. Article 8 states that 'warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State'. A warship is defined as a ship bearing the external distinguishing marks of warships of its nationality. Obviously a submerged submarine cannot display these marks, but it can bear them, and it is uncontested that it benefits from the freedom of the seas in no less a manner than surface warships.

In times of ostensible peace no ships, including potentially hostile ships, may be visited and searched, except on the conditions laid down by Article 22, and warships may not be attacked even if in a threatening position. But this does not exclude the exercise of the right of self-defence against an armed attack, and it may be argued that in time of hostilities not amounting to war the legitimacy of naval operations against foreign vessels stems from Article 51 of the United Nations Charter.<sup>2</sup> It follows that upon the high seas the traditional law of neutrality does not apply in circumstances less than war, for there can only be self-defence against an armed attacker, and no interference is permissible with other nations' shipping, even shipping which is supporting that attacker.<sup>3</sup>

The real question which confronts naval planning staffs in situations of limited hostilities is what constitutes an 'armed attack' within the meaning of Article 51.<sup>4</sup> When later in this paper tactical considerations are

<sup>1</sup> None of the authors mentioned in p. 19 n. 1 have confronted the problem of limited war.

<sup>2</sup> 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . .' Debate was concerned with the question whether there is any right of self-defence other than that conceded by Article 51 against an 'armed attack', or whether the 'inherent right' of self-defence therein referred more generally to legitimate measures of security.

<sup>3</sup> It is arguable that if interference with the freedom of navigation of non-hostile shipping is necessary and proportionate to self-defence it may be legitimate. For example, in the suggestion to mine Hai-Phong (see below, p. 35); or in the doubtful case of the Algerian emergency (see below, p. 36).

<sup>4</sup> The definition of 'armed attack' has proved difficult to most authors who have discussed the matter: Brownlie, *International Law and the Use of Force by States* (1963), pp. 278, 365-8, concludes that 'the whole problem is rendered incredibly delicate by the existence of long-range

examined it will become evident that, in certain situations, to await the launching of a controlled projectile from a potentially hostile contact before exercising the right of self-defence may well be to lose the capacity of self-defence, for whoever employs his weapon first may have a pre-emptive advantage which can prove decisive. For Article 51 to be realistically utilized, therefore, the naïve expression 'armed attack' must be refined to take into account the factor of the capability of weapons. In some situations, for example, it is arguable that the moment of armed attack may be the moment when the contacted vessel's radar 'locks on' in a firing position, not when a projectile is launched. An examination of the tactical situations that can arise obviously must precede evaluation of what constitutes an 'armed attack'.

It is interesting to recall that in naval parlance the expression 'hostile act' is used instead of 'armed attack' and 'hostile act' is distinguished from 'hostile intent'. In times of limited war 'hostile intent' is normally manifested only when a hostile act is actually committed, and operational orders may well limit the expression 'hostile act' to the actual employment of a weapon. Naval thinking has not proceeded to the point of clarifying the ambiguous borderland between 'hostile intent' and 'hostile act', and is dominated by the notion that no exercise of force against a foreign ship is legitimate unless in response to a hostile act, and is then to be restricted in scale to countering that hostile act. In the situations which have prevailed at sea since 1945 this may have proved a sufficient guideline to action, because an overtly hostile act would have represented a deliberate increase in the scale of limited war. But speculation must continue respecting the possibility of more intensive and extended threats to shipping, particularly from the submarine. It may become necessary to specify in closer detail the point at which 'hostile intent' is translated into 'hostile act', so that the tactical advantage does not irrevocably pass to the potential attacker.

Contemporary naval doctrine is dominated by a distinction between high seas and territorial seas. The considerations just mentioned respecting the freedom of the high seas do not prevail in respect of operations in the territorial sea. So far as one's own territorial sea is concerned, only vessels not in innocent passage through it may be visited and searched and if necessary expelled. The question that arises is whether the traditional law of contraband applies in one's own national waters, whether territorial

missiles ready for use; the difference between attack and imminent attack may now be negligible' (p. 368); Kelsen, *The Law of the United Nations* (1951), p. 930; Bowett, *Self-Defence in International Law* (1958), pp. 187-93; Stone, *Aggression and World Order* (1958), pp. 72-7; Goodrich, Hambro and Simons, *Charter of the United Nations* (3rd ed., 1969), p. 347, with references to debates in the United Nations. Controversy turns on the question whether reference to 'armed attack' excludes anticipatory action in self-defence, and this in part depends on the question whether Article 51 has limited the inherent right of self-defence to the occasions of armed attack. No one has satisfactorily discussed what constitutes an armed attack.

waters or inland waters, so that shipping of nations other than those engaged in hostilities may have their manifests examined and cargo of 'enemy' destination removed. The principal practice which has occurred on this point since 1945 is that of the United Arab Republic, whose Prize Court has condemned Israel-destined cargoes in neutral ships passing through the Suez Canal on the ground of a state of war between Israel and the United Arab Republic.<sup>1</sup> This state of war was said to exist legally despite the 'armistice' of 24 February 1949, which 'only imposed on the two parties the obligation not to commit new acts of aggression'. The belligerents were held to have the right 'to seize and capture enemy ships and goods at sea, within the limits allowed by the rules of public international law'.<sup>2</sup> The same Court even denied that the armistice of 1949 had survived the hostilities of 1956.<sup>3</sup> Despite this generalized basis to the right of seizure, in fact no visit and search has been conducted by either belligerent outside internal waters.

So far as hostile vessels are concerned, the innocence of their passage will depend upon the situation. In Vietnam all North Vietnamese vessels entering South Vietnamese territorial waters have been treated as hostile and force has been employed against them. The same is true in the Middle East situation. But during confrontation between Malaysia and Indonesia fire was only directed against Indonesian shipping in Malaysian territorial waters when manifestly not engaged in innocent passage. Similarly, recent practice demonstrates that naval operations in the 'enemy's' territorial sea may be commensurate with land operations. This has been the case in the Middle East and in North Vietnam.

The experience of the past twenty years tends to verify the hypothesis that, except on occasions when the balance of deterrence which exists between the great Powers is threatened, as at the time of the Cuba Quarantine operation,<sup>4</sup> hostilities not amounting to war must be confined to the territorial sea, or at least to the contiguous zone. The understanding appears to be that limited war must not escape beyond the territories of the contending parties so as to threaten the delicate balance of international relations. Hence it must not be carried into the high seas, where international interests are directly engaged. The juridical basis for this

<sup>1</sup> *The Fedala*, International Law Reports, 24 (1957), p. 992; *The S.S. Lea Loth*, *ibid.* 28 (1959), p. 652; *The S.S. Esperia*, *ibid.*, p. 656; *The S.S. Captain Maroli*, *ibid.*, p. 662; *The Inge Toft*, *ibid.* 31 (1960), p. 509; *The Astypalia*, *ibid.*, p. 519. Brown in *Minnesota Law Review*, 50 (1966), pp. 849-74.

<sup>2</sup> *The Lea Loth*, International Law Reports, 28 (1959), p. 652. In the Security Council Egypt linked the law of war with defence: see debates of July 1951, *Security Council, Official Records*, 659th Sess., p. 12, para. 68; 662nd Sess., p. 6, para. 23; 663rd Sess., p. 1, para. 1.

<sup>3</sup> *The Inge Toft*, International Law Reports, 31 (1960), p. 509.

<sup>4</sup> The Cuban Quarantine operation must be regarded as exceptional because of the magnitude of the threat which the situation was understood to present to the United States.



understanding seems to be the legitimacy of the exercise of the right of self-defence. Both parties will predicate their military action in respect of each other's territories upon the right of individual or of collective self-defence, and so seek to escape from the limitations imposed on the resort to force by the United Nations Charter. Self-defence imports restrictions of necessity and proportionality,<sup>1</sup> thereby excluding from the traditional range of options many types of naval operations, including visit and search on the high seas. This system of limitations has been less explicit in the case of the Middle East conflict, because of the manner in which that impasse was contrived and because of the role that the United Nations has played in restraining the parties, than it has been in the case of Vietnam.

Three situations will be discussed to verify this hypothesis; The Middle East, Vietnam and the Algerian emergency.

### 1. The Middle East

The Egyptian Prize Court has pointed out that the United Arab Republic has refrained from exercising belligerent rights against Israel or against neutral shipping on the high seas.<sup>2</sup> There seems to have been a general understanding that the Middle East conflict is to be confined to the territories, and this includes the territorial waters, of the respective combatants.<sup>3</sup> Although the United Arab Republic claims formally to be at war with Israel, the military situation in the Middle East has been dominated by the peace-keeping role of the United Nations, and it is this factor which appears to have imposed on the respective parties restraint in the matter of carrying the war into the high seas. A theoretical explanation of this reticence would appear to be that each party is engaged in an action of self-defence against the other which justifies its non-observance of the resolutions of the Security Council relating to the threat of peace in the Middle East.

On 2 June 1967 the Minister of Foreign Affairs of the United Arab Republic addressed a letter to the President of the Security Council<sup>4</sup> in which he stated:

The United Arab Republic in its present struggle against colonialism and foreign domination is facing a new phase of pressure and threats exercised by some States who

<sup>1</sup> Brownlie, *op. cit.* (above, p. 24 n. 4), at p. 368, says: 'the requirement of proportionality should still place restrictions on reaction'.

<sup>2</sup> In *The Inge Toft*, International Law Reports, 31 (1960), p. 509, at p. 518 it said: 'The United Arab Republic does not exercise her rights of belligerency on the high seas, but limits herself to exercising them within the confines of her territory, ports and territorial waters.'

<sup>3</sup> There was one Israeli-Egyptian engagement sixteen miles off the coast of Sinai on 11 July 1967 when the *Eilat* and two Israeli torpedo boats exchanged fire with two Egyptian torpedo boats at about 11.30 p.m., both Egyptian vessels being sunk: *United States Naval Institute Proceedings*, 95 (1969), p. 61.

<sup>4</sup> U.N. Doc., S/7925.

claim to speak on behalf of the maritime Powers. These States are attempting to follow the policies of the nineteenth century of warship diplomacy. Such an action is in no way meant to serve the cause of international trade or international navigation; it is meant merely to serve the purposes of the Israeli aggression. The United Arab Republic considers therefore any such collective measure undertaken by those States as an encroachment on the sovereignty of the United Arab Republic in the exercise of its legitimate rights over its territorial waters. Those States should realize that they have no authority to impose their mandate over the territorial waters of other States nor have they any right to claim for themselves the right of interpreting international law in a manner that would serve colonial purposes.

The United Arab Republic shall not permit any act of aggression against its territorial waters and shall take all necessary measures to secure its sovereignty. The interest of the maritime Powers lies in the respect of the sovereignty of other States; the interest of those States who call themselves maritime Powers might however be gravely threatened if they participated in any aggressive acts against the sovereignty of the United Arab Republic.

This statement appears to have set the stage for the controversy relating to the sinking of the Israeli destroyer *Eilat* on 21 October 1967. According to a letter addressed on the following day by the United Arab Republic to the President of the Security Council<sup>1</sup> the *Eilat* was seen 'speeding in the United Arab Republic territorial waters off Port Said shores. United Arab Republic naval units in Port Said were compelled to act in self-defence to stop the advance of the Israeli vessel. The subsequent exchange of fire which took place resulted in the sinking of the Israeli destroyer . . . by its latest act of aggression in the territorial waters of the United Arab Republic, Israel is further aggravating the tense situation in the area.'

According to the Israeli account of the matter delivered to the Security Council on the same day, the *Eilat* was on a routine patrol on the high seas to the north of the Sinai Peninsula and was attacked at position 31° 20.5' north 32° 32.8' east, by surface-to-surface missiles launched from within the harbour of Port Said about fourteen nautical miles (that is two miles beyond the United Arab Republic territorial sea) distant. The destroyer was on a normal patrol following a route which had been known to the United Arab Republic for several months. At 17.30 hours a green Verey light was fired in Port Said harbour. Immediately thereafter a missile was launched from within the harbour and the destroyer was hit near the boilers. A minute or two later a second missile penetrated the engine room where fire broke out. This was brought under control and rescue operations were initiated. The vessel was immobilized and dropped anchor. At approximately 19.30 hours in darkness two more missiles were launched from within Port Said harbour. One hit the ship aft and the other landed in the water and exploded. The destroyer started to sink and by 20.30 hours

<sup>1</sup> U.N. Doc., S/8205.

it was abandoned with casualties. Israel denied the Egyptian allegation that at 17.55 hours an Israeli ship had opened fire against Port Said. At 18.25 United Nations' observers informed the Israeli defence forces that the United Arab Republic authorities had announced that the Israeli destroyer had been sunk. The event was described in the Israeli letter as 'an outrageous and menacing violation of the international law of the sea', and Israel stated that it regarded 'this deliberate act of aggression committed on the high seas with the gravest concern'.

According to the Chief of Staff of U.N.T.S.O. the officer in charge in Ismailia at 16.15 hours reported that at 15.50 hours G.M.T. one Israeli ship had entered territorial waters, followed by a report five minutes later that that ship had opened fire and that the Egyptians had returned the fire.<sup>1</sup> At 20.30 hours G.M.T. a message was received from the United Arab Republic liaison officer to the effect that two Israeli armed boats 'were in vicinity local waters at about 12 miles from the shore carrying out rescue operations, the local commander had been forbidden to shoot'. On 25 October 1967 further information was received from the Chief of Staff of U.N.T.S.O. to the effect that the *Eilat* had been 'shot by a guided missile from a United Arab Republic torpedo boat posted Port Said'. The *Eilat* was said to be eleven nautical miles north-east from Port Said and that this distance had been measured by radar and other instruments from more than one place. The *Eilat* had tried to hit the missile by gun fire but had not succeeded.

On that day a debate took place on the matter in the Security Council where the representative of the United Arab Republic took as his main point the assertion that the *Eilat* was in territorial waters and was heading towards Port Said approximately ten miles off shore.<sup>2</sup> Israel took as its main point the assertion that the *Eilat* was on the high seas and that the attack was premeditated. After the first missile strike there had been an interval of one and a half hours until the second strike, which was the time necessary to obtain the permission from higher quarters to finish the ship off. 'The United Arab Republic action was the gravest extension of the Egyptian maritime lawlessness and belligerence on the high seas after having instituted naval blockades in international waters in the area.'<sup>3</sup>

The debate on the matter then turned on the question whether or not the *Eilat* was in fact in the territorial sea of the United Arab Republic. The Egyptian argument was that action had been taken against the *Eilat* because it was engaged in an aggressive operation in the territorial sea; the position of Israel was that Egypt had now escalated the hostilities and the threat to

<sup>1</sup> U.N. Doc., S/7930, Add. 43.

<sup>2</sup> U.N. Doc., S/PV. 1369, 24 October 1967, pp. 13-17.

<sup>3</sup> Ibid., p. 18.



the international community by waging war on the high seas. In the debate, the delegate of India referred to this as the main issue. He called on the Secretary-General to order an investigation in regard to the facts. The Bulgarian delegate accepted the Egyptian statement that the *Eilat* was ten miles off the coast and supported the Egyptian action on this ground.<sup>1</sup> The Soviet Union also supported the Egyptian position on the same ground.

## 2. Vietnam

For present purposes the naval operations which have been conducted in Vietnam fall into three categories:

- (a) Operation Market Time, which is the operation conducted off the coast of South Vietnam.
- (b) Operation Sea Dragon, which is the operation conducted off the coast of North Vietnam.
- (c) The Yankee Station Carrier Operations conducted from the station in the middle of the Gulf of Tonkin.<sup>2</sup>

Naval gunfire support of operations ashore is an additional task of ships engaged in Operation Market Time. The legal basis for the first operation is the legislation of South Vietnam in exercise of the competence conceded by international law to a coastal State; that for the second operation is self-defence; and that for the third operation is the freedom of navigation in the high seas.<sup>3</sup>

### (a) *Operation Market Time*

This operation was based upon the Decree on Sea Surveillance of the Republic of Vietnam of 27 April 1965,<sup>4</sup> which in turn utilized the competence conceded by international law to a coastal State respecting its territorial sea and contiguous zone. The territorial sea of South Vietnam, extending to three miles, was declared a defensive sea area, and passage of vessels through it which was prejudicial to the peace, order or security of the Republic of Vietnam would not be considered as innocent. Ships of any country operating within the territorial sea which were not clearly engaged in innocent passage would be subject to visit and search, and might be 'subject to arrest and disposition, as provided by the law of the Republic of Vietnam in conformity with accepted principles of international law'. Cargoes containing listed items would be considered as 'particularly suspect'. The passage of vessels through a contiguous zone of up to twelve miles from the baseline from which the breadth of the territorial sea is

<sup>1</sup> U.N. Doc., S/PV. 1369, 24 October 1967, pp. 52, 61.    <sup>2</sup> U.N. Doc., S/PV. 1371, p. 25.

<sup>3</sup> For telegrams from American Embassy, Saigon, to the Secretary of State on measures of sea surveillance of 27 April 1965 see United States Naval War College, School of Naval Command and Staff, *Selected Readings in International Law*.

<sup>4</sup> *International Legal Materials*, vol. 4, p. 461.

measured were subjected to the control of the Republic of Vietnam: '... to the extent necessary to prevent or punish infringements of the customs, fiscal, immigration and sanitary regulations effective within the territory or territorial sea of the Republic of Vietnam.' Entry of cargoes or persons through routes other than recognized ports of entry was forbidden by customs and immigration regulations. The Decree went on:

Accordingly, vessels within the contiguous zone 'suspected of preparing to aid in infringements of the customs, fiscal or immigration regulations of the Republic of Vietnam are subject to visit and search, and may be subject to arrest and disposition, as provided by the law of the Republic of Vietnam in conformity with accepted principles of international law.

The Decree then specified that the Republic of Vietnam would act beyond the contiguous zone to prevent or punish any infringement of the laws of the Republic of Vietnam by vessels flying the flag of the Republic of Vietnam or reasonably believed to be South Vietnamese, though flying a foreign flag or refusing to show a flag. The action to be taken against such ships might include stopping, visiting and searching. If the reasonable suspicions as to Vietnamese nationality should prove unfounded and the vessel had not committed any act justifying those suspicions, the vessel would be permitted to continue with prompt and reasonable compensation paid by the Government of Vietnam for any loss or damage which may have been sustained. Vessels which might be within the territory, territorial sea or the contiguous zone of the Republic of Vietnam were to be subject to hot pursuit on the high seas 'as provided by international law'. The Decree concluded by reciting the request of the Government of South Vietnam for the assistance of the United States Navy to enforce these measures.

It is clear that the draftsman of this decree aimed at giving precise effect to the Geneva Conventions; but it is also clear that issues arise respecting the interpretation of the Conventions, and the situation in customary international law, which might occasion difficulty to naval staffs concerned with the preparation of operational orders so detailed as to minimize the possibility of diplomatic controversy. For example, the Decree appears to envisage the interception and if necessary the arrest of foreign ships passing through the contiguous zone from the high seas, though it is arguable—and has been argued by no less an authority than Fitzmaurice<sup>1</sup>—that no breach of local law can occur except in the territorial sea or inland waters, and that hence hot pursuit is permissible commencing in the contiguous zone only when the breach has occurred in the territorial sea or inland waters, that is, in the case only of outgoing and not ingoing ships. The Decree does not render easier the task of the naval staff officer confronted

<sup>1</sup> See below, p. 72.

with this question inasmuch as it does not explicitly legislate for a duty on the part of foreign ships to stop and submit to visit and search in the contiguous zone. It is merely facultative respecting the surveillance forces. Accordingly, it is difficult to see what offence may have been committed by an incoming ship which flees into the high seas after being intercepted in the contiguous zone which would justify 'hot pursuit'. And then the question arises what constitutes 'hot pursuit' and what degree of force may be employed to terminate pursuit. In actual fact, the naval surveillance forces have acted with circumspection, and on the one occasion to which publicity has been given when a group of vessels was contacted and fled, action was taken only against those actually engaged in the contiguous zone, and others which escaped into the high seas were not subjected to 'hot pursuit'.

As explained by the Director of the International Law Division of the United States Navy,<sup>1</sup> the Defensive Sea Area created by South Vietnam within the three-mile limit involved 'no more than a temporary suspension of the right of innocent passage through the territorial seas. This suspension is authorized by the Convention on the Territorial Sea and Contiguous Zone.' It was the function of the Commander Coastal Surveillance Forces (CCF 115) to draft the Rules of Engagement for Operation Market Time, and these were amplified by Operational Orders which supplemented each other as new situations developed or new insights into the problem were gained. It was necessary to consider the method of drawing the territorial sea from its base-points, the method of delimiting the adjacent territorial seas of Vietnam and Cambodia, the situation of foreign warships in the territorial sea, the specific circumstances under which ships were deemed not to be 'clearly engaged in innocent passage', the means of positive identification of hostile vessels or aircraft, the distinction between 'immediate pursuit', which is the pursuit of a vessel or aircraft which has initiated an attack, and 'hot pursuit', which is pursuit of a vessel which has breached the law, the use of mines for interdiction of entry into unrecognized ports of disembarkation, the procedures of visit and search, the need for specific instructions to visit and search certain classified categories of foreign ships and the degree of force to be employed.

These instruments are framed by reference to the concept of police supervision in time of peace. This, however, is true in the case of the Vietnam conflict only in respect of foreign shipping, for North Vietnam ships and aircraft must be deemed in all circumstances to be belligerent. Hence it became necessary to consider the problem of positive identification in detail, and to specify the instant when fire might be directed, as well as to

<sup>1</sup> Carlisle in *The JAG Journal of the United States Navy*, 22 (1967), p. 8. Cf. Harlow, 'Legal Use of Force Short of War', *Proceedings of the United States Naval Institute*, 92 (1966), p. 88.



distinguish the occasions and the degree of response respectively in the territorial sea, the contiguous zone and the high seas. Since North Vietnam deployed supersonic aircraft, surveillance forces as well as harassment and interdiction forces had to consider the possibility of attack in one of these three areas, and the immediacy of defence and retaliation. Operational orders thus made reference to the notions of proportionality and necessity embodied in the concept of self-defence, and the problems to be discussed later in this paper respecting weapon capability are inherent in the tactical situation that prevails.

As it happens, by a self-denying ordinance on the part of all belligerents, no hostile action has occurred outside twelve miles from the coasts of either North or South Vietnam since the incidents of August 1964. Respect for the international character of the high seas has thus been built into the structure of operations in that area.

*(b) Operation Sea Dragon*

On 2 and 4 August 1964 North Vietnamese torpedo boats are alleged to have attacked United States destroyers in the high seas in the Gulf of Tonkin. The destroyers took retaliatory action, and on the second occasion carrier-borne aircraft attacked the torpedo boats and supporting facilities on the coast of North Vietnam. On 3 August the United States made the following protest to North Vietnam:

The United States Government takes an extremely serious view of the unprovoked attack made by Communist North Vietnamese torpedo boats on an American naval vessel, the U.S.S. *Maddox*, operating on the high seas, in the Gulf of Tonkin, on August 2. United States ships have traditionally operated freely on the high seas, in accordance with the rights guaranteed by international law to vessels of all nations. They will continue to do so and will take whatever measures are appropriate for their defence. The United States Government expects that the authorities of the regime in North Viet-Nam will be under no misapprehension as to the grave consequences which would inevitably result from any further unprovoked offensive military action against United States forces.<sup>1</sup>

Two days later the United States Representative in the Security Council made the following statement:

I want to emphasize that the action we have taken is a limited and measured response, fitted precisely to the attack that produced it, and that the deployments of additional U.S. forces to Southeast Asia are designed solely to deter further aggression . . .

Let me repeat that freedom of the seas is guaranteed under long-accepted international law applying to all nations alike.

Let me repeat that these vessels took no belligerent actions of any kind until they were subject to armed attack.

And let me say once more that the action they took in self-defence is the right of all nations and is fully within the provisions of the Charter of the United Nations.<sup>2</sup>

<sup>1</sup> *Department of State Bulletin*, 51 (1964), no. 1313.

<sup>2</sup> *American Journal of International Law*, 59 (1965), p. 113.

On 10 August 1964 Congress passed a Joint Resolution<sup>1</sup> reciting the attack made 'in violation of the principles of the Charter of the United Nations and of international law' upon naval vessels 'lawfully present in international waters', and approving and supporting 'the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression'.

This Resolution constituted the basis for the United States air and naval operations against North Vietnam, and, as the United States pointed out to the Security Council,<sup>2</sup> it was predicated on the principle of self-defence, in particular of collective self-defence. The inherently defensive concept of the operation now to be set up implied limitations respecting the areas of the operation, the tactics and weapons to be employed and the targets to be engaged. Operation Sea Dragon thus constituted one of harassment and interdiction of North Vietnamese logistical support for the Viet Cong movement in South Vietnam, and not one of military engagement of North Vietnam as a belligerent. It will be perceived that the task of drafting appropriate Rules of Engagement and their implementing operational orders was a lengthy and difficult one, and depended upon a clear concept of the basis of the operation being formulated by the planning and operational staff of the Commander of the 7th Fleet. That staff had to confront issues of international law, and carry the principles of international law into the documents which it was required to draft.

North Vietnam claims a twelve-mile territorial sea, and Operation Sea Dragon was limited to this area of water, in which surveillance of vessels was undertaken, destruction of water-borne logistic craft was authorized upon identification as such, and naval gunfire was directed at truck parks, assembly points, missile sites, coastal batteries, bridges and other military equipment and installations which supported the movement of personnel and supplies into South Vietnam.<sup>3</sup> In other words, the operation was restricted to the 'territory' of North Vietnam, and only immediately defensive measures were authorized against direct attack when United States vessels were on the high seas. But because the operation within the North Vietnamese territorial sea was inherently defensive, certain belligerent acts were ruled out. An example of the limitations imported by international law into operational planning has been given by the Director of the International Law Division of the United States Navy. He wrote:

If a legal state of war existed between the United States and North Vietnam we

<sup>1</sup> Pub. Law 88-408, 88th Cong. H.J. Res. 1145, 78 Stat., 384.

<sup>2</sup> *Department of State Bulletin*, 52 (1965), p. 419.

<sup>3</sup> The assertion that North Vietnam was infiltrating into South Vietnam was made by the United States on 27 February 1965. See *American Journal of International Law*, 59 (1965), p. 632.

could immediately blockade the port of Hai-Phong as a belligerent right of warfare. Without a state of war, such a blockade would be of doubtful legality. A similar analysis could be made with respect to mining harbours, contraband, neutrality, and the right of visit and search on the high seas.<sup>1</sup>

Naturally the logical point at which self-defence becomes attack is difficult to decide even in a contingent situation, and it is impossible to propose it in the abstract. If naval gunfire directed at bridges and railways is a legitimate exercise of the right of self-defence directed at destroying the logistical support for an 'armed attack', so might be blockade of a port. Blockade of North Vietnamese ports was excluded on the principle of 'necessity and proportionality'. In the actual circumstances of the case it was not militarily necessary to close Hai-Phong, nor would the interference with foreign shipping that would result be sufficiently proportional to the defence of South Vietnam against armed attack.<sup>2</sup> Hence it was both logical and expedient to limit Operation Sea Dragon to North Vietnam and its waters, and to North Vietnamese shipping, while merely maintaining surveillance for intelligence purposes of foreign shipping crossing the Gulf of Tonkin to and from Hai-Phong.

Within the limitations thus imposed, however, were further limitations imported from the traditional Laws of War. Under Article 3 of the Hague Convention XI of 1907, coastal fishing-boats not engaged in any military activity are immune from seizure or attack. In the case of Vietnam it is not easy to distinguish a fishing-boat from a water-borne logistic craft, and hence operational orders had to be drafted to give clear directions, based upon a study of fishing practices in the Gulf of Tonkin, to captains of ships as to when a boat was to be deemed not to be legitimately engaged in fishing. The requirements of the Hague Convention respecting Bombardments by Naval Forces in Time of War were also taken into account.<sup>3</sup>

### (c) *Yankee Station Carrier Operations*

The United States argument is that the strike aircraft carrier operations conducted against North Vietnam constituted a legitimate exercise of the right of navigation on the high seas. It seems to be implied that the high seas is a sanctuary in limited operations, from which offensive action can be mounted without any right in the coastal State to retaliate against the

<sup>1</sup> Carlisle, loc. cit. (above, p. 32 n. 1), p. 11.

<sup>2</sup> Mining of Hai-Phong by air-drop was contemplated and a tactical disposition of forces to this end was in fact made. Falk, 'Mining of Haiphong Harbor' in United States Naval War College, School of Naval Command and Staff, *Selected Readings in International Law*. It is understood that among the factors ruling out the operation were the interference with foreign shipping and the need to notify the existence of the minefield under the Hague rules. The Soviet view is expressed by Stefanova (in Russian) in *Soviet Year Book of International Law* (1966-67), pp. 107-15.

<sup>3</sup> See below, p. 67.



launching vessels. International law in this case would seem to be used to rationalize and justify a course of action which was not likely to meet serious challenge in the counsels of nations. It is by no means certain that the argument could be advanced with the same cogency in the case of the Mediterranean.

### 3. Algeria

During the Algerian emergency which preceded the grant of independence to the Republic of Algeria the French Navy undertook measures of control over infiltration of arms and munitions which constituted an anomalous situation in international practice. Originally the measures of surveillance undertaken purported to be based on a decree of 17 March 1956 relating to the state of emergency in Algeria.<sup>1</sup> Article 4 of this Decree extended the customs zone provided for in Article 44 of the Customs Code to distances of twenty to fifty kilometres from the coast of Algeria in respect of vessels of less than 100 tons. Article 5 specified that the powers of visit and search of such vessels provided for by the law of 4 Germinal would be extended to aircraft. The legal basis for visit and search therefore appeared to be an extension of the contiguous zone which, before the Geneva Convention was ratified by France, might well be argued to have extended beyond twelve miles. However, between 1956 and 1962 ships of more than 100 tons and ships far removed from the customs zone specified in Article 4 were subjected to visit and search.<sup>2</sup> The most notorious capture was that of the Egyptian yacht *Athos* which was in fact found to be carrying a large quantity of military contraband.<sup>3</sup> Flag ships of West Germany, Bulgaria, Denmark, Finland, United Kingdom, Greece, Italy, Panama, Netherlands, Poland, Roumania, Czechoslovakia, Yugoslavia, were also subjected to visit and search even as far away from Algeria as the English Channel. At one stage it was thought that the legal basis for such operations might be extended by resorting to the law of 18 April 1825 relating to the protection of maritime commerce, but this was not utilized because of the difficulties of applying in a modern context the provisions relating to piracy contained therein. Most of the countries whose ships were affected by French naval action protested, in some cases vigorously; and in particular serious diplomatic difficulties resulted in the relations between France and the Federal Republic of Germany. Altogether up to 31 December 1960 seventeen German ships were visited. The Polish ship *Wisla* was intercepted on 3 February 1958 between Gibraltar and

<sup>1</sup> *Décret* 56/274, *Journal Officiel* (19 March 1956), p. 2665.

<sup>2</sup> In the first year of the operation alone 4,775 ships were visited, 1,330 were searched, 182 were re-routed and one was captured: *Revue générale de droit international public*, 70 (1966), p. 1058.

<sup>3</sup> For judicial decisions of Algerian courts arising out of this incident see *ibid.*, p. 1059 n. 4; see also the debate in the Security Council of October 1956.

Casablanca and other Polish, Czechoslovak and Yugoslav ships were visited some fifty miles off the coast of Algeria. Publicity was given to the visit on 23 February 1961 of the British ship *West Breeze* seventeen miles off the coast of Spain.

Rousseau, commenting on the French naval actions, found no excuse in law for them, unless it were that the recognition of the insurgents as belligerents had furnished the French Government with 'a better legal basis for legitimating police measures extending the common law concerning the freedom of the seas'. He could only deplore 'the ignorance and misunderstanding of the clearest principles of international law' of which French courts were so often guilty and concluded: 'Il était bien suffisant que le témoignage de cette méconnaissance ait été administré pendant six ans, avec une persévérance digne d'une meilleure cause, par les autorités gouvernementales.'<sup>1</sup>

The competence of the French Navy to carry out such visits and searches, although challenged apparently at the diplomatic level, did not form the subject of action in French courts. This is because in French law it is possible to test in the courts the validity of a seizure of cargo but not the preliminary issue of the validity of visit and search, which is an act of government.<sup>2</sup> The only case which arose within the area of administrative law was that respecting an Italian ship *Duizar*. The case arose out of an application for the award of damage caused to the ship during visit and search on the high seas and the failure of the Defence Minister to satisfy the claim. The owners of the ship in their submission to the *Tribunal Administratif de Paris* argued that one of the consequences of the freedom of the seas is that on the high seas a ship is subject solely to the competence of the State whose flag it flies, and that therefore ships of war on the high seas have the power only to establish the nationality of ships which fly a different flag from themselves, without any right to inquire into nationality or flag by an examination of the ship's papers, or, *a fortiori*, to search or divert them. Reference was made to Article 22 of the Geneva Convention on the High Seas. In a Memorial submitted to the court by the Minister of Defence an attempt was made to establish a legal basis for the French naval operations, with a view to the tribunal's declaring the Italian application incompetent, or alternatively dismissing it, on the ground that the orders given by the French Navy were closely connected with the conduct of operations in Algeria and constituted a police measure affecting the external safety of the State:

Que sa légitimité ne pourrait s'apprécier que par référence aux règles de droit international public; qu'à cet égard, elle sera établie notamment par l'application du

<sup>1</sup> *Revue générale de droit international public*, 70 (1966), p. 1062.

<sup>2</sup> *Splosna-Plovba Shipowners v. Customs Authorities*, decision given on 18 April 1961 by the Tribunal de Grande Instance of Bône, Clunet, *Journal de droit international*, 90 (1963), p. 1191.

principe de la légitime défense; que l'arraisonnement du 'Duizar' est donc un acte qui échappe par sa nature au contrôle juridictionnel, et ses conséquences dommageables ne sont pas susceptibles d'être prises en considération à l'occasion d'un recours devant un tribunal administratif; que, s'agissant d'une opération de police, la responsabilité de l'État ne pourrait être engagée que si la preuve d'une faute d'une particulière gravité, d'une faute lourde, était rapportée par le requérant; que la société Ignazio Messina et Cie n'établit pas l'existence de faits constitutifs d'une faute présentant un tel caractère imputable aux services qui ont procédé au contrôle du 'Duizar'; que la prise en charge du navire par une équipe d'arraisonnement est une mesure courante en pareil cas, nécessaire pour des raisons de sécurité et ne comporte aucun caractère vexatoire; que, par ailleurs, le débarquement de la cargaison permet seul de vérifier que les marchandises transportées sont en conformité avec le manifeste . . . qu'aucune faute, même légère, n'apparaît ainsi dans les modalités d'exécution de l'arraisonnement.<sup>1</sup>

The Memorial contended that the right of visit and search was justified by the principle of self-defence which constitutes an exception to the application of the rules of law by reason of exceptional circumstances. Dealing with the question that Article 51 of the United Nations Charter refers to self-defence against an armed attack—and it could not be said that the *Duizar* was engaged in an armed attack—the question was raised whether, in addition to self-defence as envisaged in Article 51, a State does not also have the right of self-defence which enables it to arrest on the high seas any ship which threatens its internal safety. Reference was also made to the fact that the concept of self-defence is largely influenced by the progression of modern military technique. The Court found that since the visit and search constituted an act of government it was incompetent for an administrative tribunal to take cognizance of the claim. The *Conseil d'État*, on 30 March 1966, refused to quash the decision of the *Tribunal Administratif*, not specifically on the ground that the visit and search constituted an act of government, but on the ground that it was a measure taken in the course of military operations, which of their nature did not engage the responsibilities of the State in the absence of a specific law, which did not exist.<sup>2</sup>

Not since the controversies between Britain and the United States, on the one hand, and Spain, on the other, respecting the visit and search of foreign shipping off Cuba in the nineteenth century,<sup>3</sup> has there been such an extensive invasion—for security reasons—of the principle of the freedom of the seas as in the case of the Algerian operation. The large number of ships affected, and the large number of countries which became diplomatically involved, would have led one to imagine that more attention would have been paid to this situation. Since only a few ships had their

<sup>1</sup> *Ignazio Messina et Cie v. L'État (Ministre des armées 'marines')*, *Tribunal administratif* of Paris, Clunet, *Journal de droit international*, 90 (1963), p. 1192.

<sup>2</sup> *Revue générale de droit international public*, 70 (1966), p. 1056.

<sup>3</sup> Particularly *The Virginius*, Moore, *Digest of International Law*, vol. 2, p. 895, and other cases in that section.



cargoes removed, and those ships were clearly engaged in the smuggling of arms into Algeria, the operation did not seriously affect the navigation of the high seas, and this, together with the political situation prevailing, would seem to explain the reticence on the part of flag States of the ships affected with respect to demands on the French Government. The fact that France was able for so long and in so extensive a manner to exercise naval power on the high seas on the ground of self-defence causes one to ponder on the extent to which a conservative appreciation of international law has a role in defence planning. Perhaps the lesson of the Algerian situation is that French naval operations had the fullest support of the political branch of government, which was confident of being able to maintain its position in the face of international pressure. It is not every country whose Navy finds itself in this position.

#### IV. INTERNATIONAL LAW OF WAR AT SEA AND CHANGING TECHNOLOGY

Consideration will now be given to a number of areas wherein changing technology, leading to changed tactics and practices, have posed new questions of international law. The first area is that of anti-submarine warfare (A.S.W.), which is the main preoccupation of many navies; the second area is defence against missile attack; and the third is the role of the navy in harassment and interdiction of the shore by bombardment.

Three expressions require definition for an understanding of what follows: in an *active* mode power is emitted from a radar sensor set; the target reflects some of that power back to the originator who then marks the time taken and the direction (the time taken gives range). In a *passive* mode the radar or sonar set collects energy not self-emitted. This energy comes from the target itself, for example, noise, radio, radar transmissions. The term *locked on* is often used loosely, but it basically refers to the radar component of a fire control equipment which is controlling itself to keep the target in the middle of the beam. When the radar has locked on to the target the fire-control problem can be solved, and where appropriate the gun or launcher can be aimed off, taking into account the movement of the target. In one method the set transmits an eccentric beam and the returning target echoes are compared in a phase-comparison technique to indicate in which portion of the beam the target is situated. The information is then used to direct the radar scanner in the direction of the target. A bearing-rate system is used so that a target flying a steady course, speed and range will give a steady bearing rate. This enables gunnery systems to aim off the correct amount when attacking the target. 'Locked on' is detectable by the target because its electronic counter measures (E.C.M.) equipment

shows a continuous, as opposed to interrupted, radar emission directed at it.

### 1. Submarine Warfare

To appreciate the questions which arise in this section of the paper it is necessary to examine the nature of A.S.W., taking into account the role of the submarine, and the capability of the weapons employed by and against it.<sup>1</sup>

#### (a) *Technological Considerations*

Until early in World War II submarines were usually propelled by diesel with a motor generator on the shaft between the propeller and the engine. Air intake for the diesel motor was only available when the submarine was on the surface with the conning-tower hatch open. Hence submarines surfaced nightly to charge their batteries and circulate air. The introduction in 1942 of the snorkel, a device for introducing air from the surface through a breathing tube, enabled submarines to stay submerged indefinitely and reduced the exposure to air attack. Most submarines today use diesel-electric propulsion, and must have access to the atmosphere to charge the batteries. Nuclear-powered submarines require access to the atmosphere only if the air-purification system malfunctions or for tactical reasons. It follows that the tactics respecting conventional and nuclear submarines differ in detail because the one must regularly approach the surface to breath while the other has extended deep-submerged endurance.

The submarine's weapon remains the torpedo, which falls into two basic types. The first type is semi-diesel propelled. Designed well before World War II, this torpedo uses compressed air and oil fuel. It has a fast speed (about 40 knots), is very noisy, but carries a suitably sized war-head for maximum damage on large merchant ship and warship hulls. The second type is propelled by battery. It has slower speeds (about 20 knots), is quiet, and often capable of wire guidance combined with terminal homing by active and/or passive homing devices. The passive homing capability can suffer from surface or bottom noise seduction, and depends on the target radiating a suitably high noise level. Acoustic torpedoes were used by

<sup>1</sup> The only special studies devoted to the law of submarine warfare since 1945 are by Mallison Naval War College, International Law Studies 1966, *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars* (1968); Barnes, 'Submarine Warfare and International Law', *World Polity*, vol. 2, pp. 121-202. Neither work advances the problem beyond the situation of 1945, although Mallison has some observations on nuclear weapons and limited war. Zemanek, loc. cit. (above, p. 19 n. 1), records the situation as in 1945. Shorter contributions are by Eichelberger, 'The Law and the Submarine', *Proceedings of the United States Naval Institute*, 77 (1951), p. 691; Miller, 'New International Law for the Submarine', *ibid.* 92 (1966), p. 96; Robertson 'Submarine Warfare', *The J.A.G. Journal of the United States Navy*, 10 (1956), p. 3.

U-boats during the later stages of World War II, and were countered by noise-making decoys towed behind ships.

More recently the submarine has acquired a new weapon, the missile. There are several types of submarine-fired missiles. The American Polaris and Poseidon ballistic missiles may be fired while the submarine is submerged, and they use the upper trajectory.<sup>1</sup> They are normally employed by Western navies in a strategic role, but the Russian equivalent was initially intended for use in a tactical role against Western naval strike forces. The Russian cruise missile, which uses the lower trajectory and is probably fired only from a surfaced submarine, is also a tactical weapon. The American Subroc, or submerged-launched air flight missile, which is intended to be the logical successor to the torpedo in an anti-submarine role, has not yet been developed to the point of general use in the submarine fleet.

Submarine sensors include vision, radar, electronic counter-measures (E.C.M.) and sonar. Visual apprehension, by means of the periscope when submerged, remains the primary and the most reliable method of identification and classification in daylight. Submarine periscopes have kept pace in their development with speeds and tactics of surface and air vehicles, so that the World War II balance of probabilities of sighting between submarines and surface vessels and aircraft has remained constant. Radar is an aid in air defence but is seldom used in tactical situations by submarines, who prefer to use passive sensor devices. Radar suffers from disadvantages which are to be discussed later.<sup>2</sup> E.C.M. is an important sensor in submarine operations because of a range advantage of about 2:1 over radar. By this means information on frequency, bearing, range indication and radar type is normally acquired. The most important submarine sensor is the sonar, which is limited by three physical laws: (i) range is inversely proportional to intensity; (ii) directivity is dependent on frequency and hydrophone configuration, so that the lower the frequency the larger the aerial array required; and (iii) wave distortion of sound rays occurs due to oceanological patterns, namely density and temperature changes.

All these sensors suffer from inherent limitations. The factors affecting the periscope are its distinctive wake in calm seas at even moderate speeds; the curvature of the earth; upper lens fouling from ocean surface pollution, spray and swell; and vibration, particularly at high speed. The effectiveness of the searching radar depends upon sea-surface conditions. In a calm sea a periscope can be easily detected by radar, but in heavy weather would be lost in the sea surface echoes painting on the radar

<sup>1</sup> *Jane's Fighting Ships 1968-69*, pp. 547-60, covers the whole range of naval missiles; Kuenne, *The Polaris Missile Strike* (1966).

<sup>2</sup> See below, p. 77.



screen. E.C.M. normally provides information on frequency, bearing and other characteristics, but is unreliable with respect to range because of the necessity to estimate the power output of the aircraft or ship detected, which is often varied as a tactical means of confusing submarine operators. The capability of the sonar has hitherto been restricted by a lack of adequate scientific knowledge of areas of the sea, as well as by technical limitations. Passive sonar arrays are dependent on a quiet listening background, and so submarines have evolved techniques of minimizing self-noise so as to increase their listening effectiveness and decrease their chance of being detected by a passive enemy sonar.

A.S.W. is conducted by surface vessels, fixed-wing aircraft, which are valuable against snorting submarines (i.e. submarines employing a snorkel), but of limited use against high-speed nuclear vessels, and the rotary wing aircraft which were a significant advance in anti-submarine warfare. A helicopter can assume an active or passive sonar role by lowering a listening device into the sea, and it is currently invulnerable to submarine counter-attack. It is limited by weather conditions and in sonar range. Shore control fixed acoustic arrays are not as effective as originally hoped, due to high background ocean noise level and general ignorance of sonar transmissions through ocean patterns, though they are a significant factor, and raise important naval implications for proposals to 'internationalize' the deep seabed. The siting of such arrays on one's own continental shelf might be a defensive action, but if they were placed around a foreign naval base, and even upon a foreign continental shelf, they might be offensive in purpose.

The problems of the law of the sea are as relevant to air forces as to navies because of the role of maritime reconnaissance aircraft, particularly in A.S.W. Naval and air force fixed-wing aircraft may employ a variety of methods of positive identification, classified at two levels, those of long-range detection and those of short-range localization, as follows:

### *Detection*

1. Radar. Its use depends on the conditions at the time but because it operates in the active mode it warns the submarine of its presence. Radar is only effective when a submarine is displaying one, or more, masts above the surface.

2. L.O.F.A.R. (Low-frequency analysis and recording). This is contained in a sonobuoy dropped from the aircraft which transmits its contact information to the aircraft. It gives no information to the submarine of its presence.

3. E.C.M. (electronic counter-measures). This is useful only when the submarine transmits on radar, or radio, which is rare.

4. Visual. The submariner should sight the aircraft before his periscope is itself seen.

5. I.R.L.S. (infra-red line scan) which may be operated from satellite and operates on detection of heat levels. It may be the major development in A.S.W. of the future, though it has limited value against deeply submerged submarines.

6. S.N.I.F.F.E.R. (E.T.I.). A code name for an exhaust trail indicator which detects the exhaust emitted by a snorting diesel submarine.

### *Localization*

1. C.O.D.A.R. A phase of the dropped sonobuoy which is localized to less than four miles. Both L.O.F.A.R. and C.O.D.A.R. are contained in a sonobuoy operating on the passive mode, and known to the Western navies as Jezebel. It detects in its true mode the low-frequency sound emitted by a snorting submarine. The difference between L.O.F.A.R. and C.O.D.A.R. consists in a shift from a low-frequency spectrum which has lower attenuation in the water and so a longer range, to a higher-frequency spectrum with better direction but shorter range.

2. Sonobuoys which may be passive or active.

3. M.A.D. (magnetic anomaly detection), a passive device for close-range detection depending on the changes inducted in the earth's magnetic field by the submarine. The aircraft must almost fly over the submarine for it to be effective.

The United States Navy lists six A.S.W. situations in times of ostensible peace, with directions as to the action to be taken respecting each. This must be taken as a guide to the practice of States since it has gained general naval currency, and is familiar to and apparently acquiesced in by the Soviet navy. These situations are:

1. Where a submarine is detected in the act of attacking 'friendlies'.
2. Where a submarine is detected in the act of launching a missile.
3. Where 'friendlies' are detected in the act of prosecuting a submarine contact and the question of joining in arises.
4. Where an unidentified submarine is detected in inland waters.
5. Where an unidentified submarine is detected in territorial waters.
6. Where an unidentified submarine is detected on the high seas.

There is a scale of levels of response laid down, depending upon the situation. Obviously action will be immediate in the first two situations, and the transition from interrogation to attack may, in the nature of the distinction between inland waters and the territorial sea, be more immediate in situation 4 than in situation 5

The principal difficulty in submarine contacts is one of positive identification, and it is for this reason that procedures must be followed carefully to avoid a threat to submarines exercising the freedom of navigation and not themselves in a threatening posture. The N.A.T.O. and United States naval procedures depend on a classification scale of four levels, each of pre-determined criteria, as follows:

1. Non-sub. This is where sensors have provided evidence of a contact but the indications point to its not being a submarine.
2. Possible-sub. This is where sensors have provided some evidence of a contact, and the category is subdivided into four confidence levels based on the information received and the number of sensors in contact according to a classification code.
3. Probable-sub. This is where at least two sensors provide certain classes of information which lead to the evaluation concluding that there is a probable submarine contact.
4. Certain-sub. This is where visual identification makes for certainty.

Once a submarine contact is made the next step is to follow up with all available sensors to attempt to achieve either a Certain-sub, or a Non-sub, classification. Sensors available to the escort vessel are mainly centred around the active sonar set. The type of echo is an indication, and a 'woolly' echo would suggest an object not so solid as a metal hull. Wrecks lying on the bottom are charted, so far as is possible, but the task of choosing between an uncharted wreck and a bottomed submarine is difficult. 'Doppler', the change in sonar echo pitch due to target movement, is an excellent classification aid, but many a submarine contact has turned out to be a whale. A well-trained and well-maintained submarine would not normally make a noise to give a clue to its existence—such as hammering or running noisy machinery—while it knew an escort to be investigating it.

Fixed-wing A.S.W. aircraft have the advantage of not producing background noise in the water close to their sonobuoys and so have developed passive classification aids. Here L.O.F.A.R. print-outs of a submarine's noise characteristics will often give specific detail of the type of submarine being tracked. Provided the sonobuoy is operating under good conditions this type of information can lead to positive identification of a submarine. Once the type is ascertained nationality may be automatically attributed.

#### *(b) Submarine and A.S.W. Tactics*

The tactics used in any situation will depend on the priorities detailed in the respective war orders of the participants. Traditionally the submarine has been better employed in sinking or damaging the heavy units of the opposing fleet—this includes the merchant marine, particularly tankers. Opposing escorts have usually concentrated on the 'safe and timely arrival



of the convoy' with the destruction of enemy submarines a welcome bonus, but subsidiary to the main task.

A submarine's opening tactic will usually be to locate the enemy force. To achieve this it will combine the shore intelligence transmitted to it with the radio, E.C.M. and sonar interception it is able to achieve at sea. It will change depth to use surface or deep sonar channels, alter courses and speeds to close possible targets; always attempting to avoid detection by enemy air, surface or submarine units while achieving its primary aim.

The protecting units, on the other hand, will make every effort to harass, decoy and intercept the submarine before it attacks. Where detection is made, the heavy units will usually be re-routed while the escorts intercept and attack the submarine. Identification problems of determining that the submarine is, in fact, enemy are normally avoided by ensuring no friendly submarines are in the areas in question. Where friendly and enemy submarines are both in the same area of water the problem of identification is most difficult—almost impossible—and the friendly submarine will probably be ordered to surface, thus rendering it ineffective in the action and also vulnerable to attack while on the surface.

While the surface vessels in the past normally had a speed advantage over their submerged adversaries, the nuclear propelled submarine has reversed the situation. This vessel can cover large areas of the ocean in the search for targets, and carry out multiple attacks once the target is located. Another aspect is that missile-firing submarines may launch at a range well outside effective sonar detection, which means that they may never come within the defended ocean area. In this case the combination of advanced friendly submarines and heavy maritime aircraft cover are the common tactic to prevent launching; and anti-aircraft guns and missiles are used to intercept missiles in flight before reaching the target area.

### *(c) Development of International Law of Submarine Warfare up to 1945*

Great Britain, which sensed its vulnerability to the submarine and wished to retain surface supremacy, tried hard to outlaw the submarine at the Hague Peace Conference of 1899.<sup>1</sup> She was then supported by Germany, but the move was defeated by France, which has always been extreme in its support of the submarine. In 1914, then, the submarine was legally a warship like any other, and subject to the same rules. The fact that it might become a commerce destroyer by stealth and seek to escape from those rules was not adverted to by Mahan, Tirpitz or any other strategic authority except Fisher. The assumption upon which all

<sup>1</sup> Scott, *Proceedings of the Hague Peace Conferences, The Conference of 1899* (1920), pp. 365-8.

proceeded was that submarines would comply with the Declaration of London drafted at the London Naval Conference of 1908,<sup>1</sup> which allowed a neutral vessel, which had been captured by a belligerent warship and which would be liable to condemnation in a prize court, to be destroyed 'as an exception', if the safety of the capturing vessel could not be ensured by taking it into port. This was to prove the thin end of the wedge, for a submarine, by definition, was hazarded by taking a ship in prize into port. The problem of the Declaration for the submariner, however, was that the crew of the neutral ship was to be placed in a safe position prior to the destruction of the ship. Also, it omitted all reference to merchant ships of belligerents.

The steps by which Germany was drawn into unrestricted submarine warfare are significant, because the lesson is that unless naval policy is co-ordinated with legal and political policy the conduct of operations is seriously affected. Until February 1915 U-boats attacked only warships, but consideration was given to attack on British merchant ships when the British blockade was tightly drawn and the German navy began to suffer from frustration.<sup>2</sup> The German Naval Staff wished to declare a war zone around the British Isles and to sink all shipping within it. The German Foreign Office said this would be contrary to international law and would provoke neutrals, and it opposed the suggestion. The Chancellor, Bethmann-Hollweg, supported the political arm of the Government, but in February 1915 gave way to the Naval Staff, permitting it to declare a war zone and give notice that 'every enemy merchant ship found in the war zone will be destroyed without its being always possible to avert the danger threatening the crews and passengers on that account'.<sup>3</sup> At the insistence of the Foreign Ministry this declaration was drawn in the form of a reprisal, so giving it superficial legal validity and enabling German diplomats the more easily to justify it—reprisals for the British Admiralty's order of 31 January 1915 that British merchant ships should on occasion show neutral colours as a *ruse de guerre*, and reprisal for Admiralty's orders restricting passage through and into the North Sea by neutrals to channels where blockade supervision would be possible, and the mining of the other approaches.

The United States protested at this declaration, but only respecting

<sup>1</sup> Scott, *The Declaration of London*, February 26, 1909 (1920).

<sup>2</sup> Great Britain took punitive action against captured U-boat crews on the ground that they were unlawful combatants. Germany retaliated with similar treatment of an equal number of British officers, and executed Captain Fryatt of the unarmed British merchant ship *Brussels* for refusing to surrender and attempting to ram a U-boat: Mallison, *op. cit.* (above, p. 40 n. 1), pp. 35, 51.

<sup>3</sup> *British and Foreign State Papers*, vol. 110, p. 1031. The policy struggle is recounted by Admiral Scheer, *Germany's High Seas Fleet in the World War* (1943), pp. 215–32, and by Grand Admiral Tirpitz, *My Memoirs* (1919), vol. 2, pp. 137–47; Garner, *Prize Law During the World War* (1927), p. 630; Barnes, *loc. cit.* (above, p. 40 n. 1), p. 136.

neutral and not British shipping.<sup>1</sup> However, the protest caused such consternation and internal dissension in the German Government that naval policy became paralysed. In the following six months 150 different and often contradictory orders were issued to U-boat commanders.<sup>2</sup> The submarine campaign was on again, off again, on again, off again. Some orders required the commander to identify neutral shipping, but these were rendered abortive by a British Admiralty's directive of 10 February 1915 that British merchant ships should as closely resemble neutrals as possible, copying any particular lighting system of neutrals, and should attempt to ram submarines.<sup>3</sup> It was during this period of confusion that the *Lusitania* was sunk, causing the Kaiser to intervene in the controversy between the Naval Staff and Wilhelmstrasse and to order that no passenger ships should be sunk.<sup>4</sup> This was regarded by the U-boat commanders as hopelessly restrictive since they had great difficulty in identifying through the periscope one class of ship from another.<sup>5</sup>

During a vital period when the Admiralty was not organized to defend British shipping against submarine attack, Germany pressed that attack home in less than a half-hearted way. She felt compelled to justify submarine attacks on merchantmen as exceptional in international law, but because policy had not been firmly laid down in Berlin, the justifications were various and changing, and so lost their cogency in the eyes of neutrals and the belligerent public, and even of the German politicians.<sup>6</sup> First, Germany announced in February 1916 that all armed merchant vessels would be regarded as warships and sunk on sight.<sup>7</sup> This followed the mounting of a 4-inch gun on the stern of some British merchant ships, and was almost necessary for the survival of U-boats, when the advent of the Q ship meant that a U-boat would be exposed to fire when surfaced and attempting to follow the current rules of submarine warfare. Secondly, following an American protest at the sinking of the cross-Channel packet *Sussex* in March 1916, Germany declared that its naval forces were under orders to act 'according to the recognized principles of international law', and not to sink merchant vessels without warning and without saving lives 'unless these ships attempt to escape or offer resistance'. Since all British merchant ships attempted to escape or offer resistance the argument implied that their sinking was exceptional to international law.<sup>8</sup>

<sup>1</sup> *Foreign Relations of the United States, 1915, Supplement*, p. 99.

<sup>2</sup> Colbert, *Retaliation in International Law* (1948), p. 174.

<sup>3</sup> *Foreign Relations of the United States, 1915, Supplement*, p. 653. This Order was a reaction to the German proclamation of 4 February 1915 of an 'area of war' around the British Isles in which some of the justification put forward was in the British declaration of 3 November 1914 of an intent to create such an area between Scotland and Norway.

<sup>4</sup> Tirpitz, *op. cit.* (above, p. 46 n. 3), p. 157.

<sup>5</sup> *Ibid.*, p. 170.

<sup>6</sup> Barnes, *loc. cit.* (above, p. 40 n. 1), p. 139.

<sup>7</sup> *Foreign Relations of the United States, 1916, Supplement*, p. 163.

<sup>8</sup> *Ibid.*, p. 259.



When the United States pointed out that British misconduct of the war could not justify German misconduct, the U-boat campaign quietened down until 6 October 1916, when U-boats were ordered to attack merchant ships only after giving warning and providing for the safety of the crews. This policy was attempted for some months, but it was found that the submarine was too vulnerable to surface gunfire, ramming, and the deceptions of the Q ships.

By early 1917 Germany was consumed with frustration, and on 8 January the Chief of Staff of the Navy presented a memorandum which showed how the submarine could turn the tide in Germany's favour, provided no restrictions were placed on its use. Next day the Government endorsed the memorandum, and on 31 January 1917 a declaration of unrestricted submarine warfare within the declared war zone was issued, and again justified as a reprisal for British violation of the law of blockade.<sup>1</sup> The tremendous toll exacted by the U-boats in the spring of 1917 is the more remarkable in view of the fact that at no time during the entire war did Germany have more than 140 submarines in active service, of which about one-third would have been on operations at any one time.

The lesson to be drawn from these events in World War I is one of administration more than of law. Naval policy had not been firmly decided upon when war broke out, and the tussle between the Naval Staff, preoccupied with strategic and tactical considerations, and the Foreign Ministry, preoccupied with presenting a good case in international law so as to justify a firm diplomatic stance, frustrated naval policy at a crucial moment. The lack of foresight, planning and effective liaison between the Navy and the legal and diplomatic services of the Government became patently obvious early in 1915, and Germany's position was seriously weakened by her constant change of ground. In fact, in international law Germany had a good case. She failed to exploit it effectively in neutral eyes and eventually roused the neutrals to anger. It is worth remembering that at the time of the sinking of the *Lusitania* the United States was just as much at odds with Great Britain over violations of the law of neutrality as she was with Germany over the submarine question. It is also important to remember that Germany's submarine policy was based on reprisals, and hence on an exception to a principle, so demonstrating the powerful influence that international law, vague and uncertain as it was, exercised on the situation.

After the war the problem of the submarine was for a time caught up in the general question of disarmament, and in this context attempts were made to outlaw it. There was a universal feeling that the sinking of merchant ships without warning should be forbidden, and this feeling led to

<sup>1</sup> *British and Foreign State Papers*, vol. 111, p. 983.

the charging of eighteen German U-boat commanders before the German courts in 1922, only three of whom were actually tried, two for sinking hospital ships. On the charge of unrestricted submarine warfare the third officer was acquitted by the German Supreme Court on the defence of superior orders.<sup>1</sup>

It was again France which led the move at the Washington Conference in 1923 to defeat British attempts to ban the submarine. A United States resolution which by implication would cover submarine warfare was, however, adopted. It stated that 'for the protection of the lives of neutrals and non-combatants at sea in time of war' the following rules are to be deemed part of international law:

1. A merchant vessel must be ordered to submit to visit and search before it can be seized. It can only be attacked if it refuses so to submit.
2. A merchant vessel must not be destroyed unless its crew and passengers have been placed in safety.<sup>2</sup>

The resolution then went on to state that if a submarine cannot conform with these rules it must refrain from attack; and refusal to exercise such restraint would be regarded as 'piracy'. The matter again arose at the London Naval Conference of 1930, when Great Britain once more made a bid to outlaw the submarine. The result was merely a reiteration of the proposition that 'in their action with regard to merchant ships submarines must conform to the rules of international law to which surface war vessels are subject'.<sup>3</sup> In particular, except in the case of persistent refusal to stop on summons, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink a merchant vessel without having first placed the passengers, crew and ship's papers in a place of safety—the ship's boats not being a place of safety. When the Treaty of 1930 was allowed to expire in 1936, the portions respecting submarine warfare remained binding on the parties, who took steps, however, to incorporate them in a new instrument, the London Protocol of 6 November 1936,<sup>4</sup> which was acceded to by Germany and Soviet Russia as well as by many other countries, so that on the outbreak of World War II there were thirty-six States bound by the London rules.

German surface raiders, at least in the early stages of the war, scrupulously observed these rules, and the thirty-nine U-boats which were at operation stations on 3 September 1939 were under orders to conform to them.<sup>5</sup> It was with disbelief, then, that the German Naval Staff received the British news of the sinking of the unarmed and unescorted *Athenia* on

<sup>1</sup> *American Journal of International Law*, 16 (1922), pp. 674–724.

<sup>2</sup> U.S. Department of State, *Conference on the Limitation of Armaments, Washington, November 12, 1921–February 6, 1922* (1922), p. 1607.

<sup>3</sup> *League of Nations Treaty Series*, vol. 112, p. 65.

<sup>4</sup> *Ibid.*, vol. 173, p. 353.

<sup>5</sup> Roskill, *The War at Sea, 1939–1945*, vol. 1, p. 59.

the outbreak of war, and a strong denial was made. When U-30 returned to base, however, the fact was established. A controversy stirred the Government, and the result was the issuing of further orders on 7 September that passenger ships should be spared, even when in convoys.<sup>1</sup> The captain of U-30 was also court-martialled for disobedience of orders, although he was acquitted on the defence that he believed the *Athenia* to be an armed merchant-cruiser.

On 23 September 1939 the dilution of Germany's standards began when Hitler ordered that all merchant ships which radioed their positions when stopped by German submarines were to be sunk, and that all merchant ships except passenger ships might be sunk without warning, since it was to be assumed that they were armed in accordance with a British Admiralty directive.<sup>2</sup> This order was withdrawn on 3 October 1939, and reimposed on 16 October, when it was added that passenger ships in convoy could be torpedoed a short while after notice had been given of the intention to do so.<sup>3</sup> Admiral Raeder wanted to go further and lay siege to England, as he put it, but Hitler, under pressure from the Foreign Office, declared himself opposed to the flouting of international law for fear of neutral reaction.<sup>4</sup>

Out of this tussle resulted a compromise, as in World War I, namely the declaration of a War Zone around the British Isles which all ships would enter at their peril. An international law justification for this was offered on 18 January 1940. It was argued that mining in the interests of blockade is legal; mines destroy belligerent and neutral shipping indiscriminately; the War Zone was an area within which mining would be legal; what difference was there between destruction by torpedo and mine? From 1940 to 1945 unrestricted submarine warfare became universal practice, and the only significance of the War Zone was that this was an area into which neutrals ventured at their peril.

At Nuremberg Admirals Raeder and Doenitz were among the major war criminals, and among the charges laid against them were waging unrestricted submarine warfare and violation of the London Protocol in the declaration of War Zones.<sup>5</sup> The prosecution assembled a great amount of evidence on these charges and the case was fully argued. After hearing Doenitz's defence that it was the British Admiralty that had taken British

<sup>1</sup> U.S. Navy Department, Office of Naval Intelligence, *Führer Conferences on Matters Dealing with the German Navy*, vol. 1 (1947), p. 3. The casting of the German policy as an escape from the restraints of the London Protocol because the British Admiralty had already breached it is clearly explained by Doenitz, *Memoirs* (1958), pp. 11, 12, 34, 35, 54, 56, 58, 60. On the arming of merchant ships see Borchard in *American Journal of International Law*, 34 (1940), p. 107.

<sup>2</sup> *Führer Conferences on Matters Dealing with the German Navy*, vol. 1 (1947), p. 9.

<sup>3</sup> *Ibid.*, p. 21.

<sup>4</sup> *Ibid.*, p. 13.

<sup>5</sup> *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg* (1948), vol. 22, p. 558.



merchant ships out of the protection of the London Protocol, the Tribunal held that 'in the actual circumstances of the cases, the Tribunal is not prepared to hold Doenitz guilty for his conduct of submarine warfare against British armed merchant ships'.<sup>1</sup> So on this charge there was an acquittal. However, the Tribunal held that international law created no exception for war or operational zones. In any such zones the ordinary rules should be followed. On this charge Doenitz was found guilty.

(d) *The Contemporary Legal Problem in A.S.W.*

The legal situation as a result of the Nuremberg Tribunal's finding could not be more explicit or more simple: the submarine is subject to the same rules as a surface ship provided that its operations are governed by no greater risks. When the enemy's merchant ships are convoyed, or when they are instructed to defend themselves by any means against submarine attack, or when the submarine is exposed to disproportionate risk of air attack, to which it is highly vulnerable, by surfacing to save passengers and crew, the submarine is exempted from the provisions of the London Protocol. Yet almost all legal discussions of A.S.W. since World War II have done little more than recite that instrument as if it were really effective to govern the rights and duties of belligerents, and in disregard of the lessons of the Doenitz trial, and the experience of World War II. This is true of the writings of Lauterpacht,<sup>2</sup> Colombos,<sup>3</sup> Castren,<sup>4</sup> Dahm,<sup>5</sup> Berber<sup>6</sup> and Mallison.<sup>7</sup> The French Naval Instructions repeat the obligation of submarines 'de se conformer aux règles du droit international auxquelles sont soumis les bâtiments de guerre de surface'.<sup>8</sup> The Manual of International Maritime Law of the Soviet Navy states:

Military operations of submarines against merchant shipping in time of war are regulated under the rules of the London Protocol of 1936, the provisions of the Nyon Agreement of 1937, and the decisions of the Nuremberg Military Tribunal of 1946, based on the Charter.<sup>9</sup>

It then paraphrases the London Protocol, and after some tendentious observations about its violation by Great Britain and the United States, concludes realistically but unhelpfully with the proposition that

. . . under present-day conditions, with the appearance of nuclear submarines armed

<sup>1</sup> Ibid.

<sup>2</sup> Oppenheim, op. cit. (above, p. 19 n. 1), p. 492.

<sup>3</sup> Ibid., pp. 457, 493, 504, 512, 737, 746, 789.

<sup>4</sup> Ibid., p. 289.

<sup>5</sup> Ibid., vol. 2, p. 431.

<sup>6</sup> Ibid., vol. 2, pp. 186, 192.

<sup>7</sup> Ibid., *passim*. In addition see Krüger in *Marinerundschau* (1959), *Beiheft* 5; Sohler, *ibid.* (1956), *Beiheft* 1.

<sup>8</sup> *Instructions sur l'application du droit international en cas de guerre* (1966), vol. 1, Art. 8.

<sup>9</sup> Ministry of Defence of the U.S.S.R., *Voenno-Morskoy Mezhdunarodno-Pravoroy Spravochnik* (1966), Part III, chapter 2, s. 10.

with missiles, as well as new ASW equipment (sonobuoys, sonar, ASW carriers, etc), international law rules now in effect have become quite obsolete.

Stone's admonition of 1953<sup>1</sup> has been ignored, except incidentally by Barnes.<sup>2</sup> He said:

It is also quite idle for Powers whose naval supremacy in surface craft enables them to pursue the aim of annihilating the enemy's seaborne commerce without 'sink at sight' warfare, to expect that States which cannot aspire to such supremacy will refrain from seeking to annihilate that commerce by such naval means available to them as submarines, aircraft and mines. To refuse to face this will save neither life nor ship in any future war; and it will also forestall the growth of real rules for the mitigation of suffering under modern conditions . . . The refusal of the International Military Tribunal to visit punishment upon Admiral Doenitz for breach of the treaty rules as to submarines, earnestly challenges the publicists of all nations to rethink their positions. Only thus can some part of the humanity which now enters this sphere on paper only, re-enter the field of war practice controlled by law.

Since he wrote, technological changes have portended even greater difficulties for the lawyer who thinks that the London Protocol is the only issue for discussion.

The truth is that the requirements of the London Protocol are to be observed only in the situation where the submarine can act with minimal risk on the surface. Since that situation is now an ideal hardly ever in practice to be realized, one is compelled to draw from the Doenitz trial the conclusion that submarine operations in times of war are today governed by no legal text, and that no more than lip-service is being paid in naval documents to the London Protocol. This conclusion may be disheartening, but to contemporary naval officers it is also mainly irrelevant to the problem which confronts them, which is that of A.S.W. in conditions of ostensible peace. Major war is not nowadays the preoccupation of naval staffs, but the daily detection of submarines whose role is part of the balance of deterrence is, and it is in this respect that legal and naval thinking must be brought into coincidence.

The problem posed is one of self-defence. It is pointless engaging in intensive A.S.W. training without equally intensive reflection upon the rules of the war game when it becomes more serious. The international lawyers have been so vague in their apprehension of what amounts to an 'armed attack', and so unhelpful with respect to the question whether there is an inherent right of defence against other than an 'armed attack', that the intellectual framework of contemporary A.S.W., which gives relevance to the tactical doctrine expounded in A.S.W. schools, is dangerously insecure. So long as this insecurity prevails, action in a crisis is likely either to be too long delayed or too rash.

<sup>1</sup> Op. cit. (above, p. 19 n. 1), p. 607.

<sup>2</sup> Op. cit. (above, p. 40 n. 1), p. 199.

The real question for consideration, once the necessary level of positive identification has been obtained, is whether the contact has a hostile intent which may be translated into a hostile act. The evaluation of the factors in self-defence will naturally depend upon the degree of political tension affecting rival naval countries. When the level of tension is low, as it is nowadays in the case of N.A.T.O. and the Soviet Union, submarines may become extensively involved in the exercises of the other party without the need of self-defence arising. When it is high, as at the time of the Cuban Quarantine, this need may be acutely felt. In such situations it becomes a matter of evaluation from the plotted track of the submarine, whether or not it is merely in transit and to what extent a threat is posed, and when such an evaluation is made it is then a question of determining what constitutes a 'threatening posture' or an 'armed attack'.

However, no amount of evaluation will determine a submarine's intent, and, given the performance characteristics of modern torpedoes, the submarine's mere presence within range poses some threat.

It is impossible for anyone outside a submarine to determine what state of readiness it is in. A raised periscope could be merely observing the surface scene as a seamanlike precaution to avoid collision; or it could be taking a final range and bearing prior to firing a weapon. Submarines generally avoid the use of radar but the detection by an escort of a submarine radar could be unimportant; or it could be the final check of range before firing. In the case of sonar, the most important sensor in A.S.W., a surface vessel will have no indication of whether a submarine is tracking him on passive sonar. The surface vessel can only assume that when it makes a submarine detection, then it is likely that the submarine has been tracking it for some time, and might already have made all preparations to launch its attack.

A most difficult problem therefore presents itself to a naval commander, in a time of political tension, as to what measures he may reasonably take to protect his ships from submarine attack. He must employ an amount of force commensurate with the situation in which he finds himself. One way to approach the problem would be to assume that where a potentially hostile submarine achieved a position where it had, say, a 10 per cent chance of successfully attacking a major unit, then it could be assumed to be in a 'threatening posture'. The figure of 10 per cent is chosen at random in this instance as a reasonable balance between aggressiveness and self-defence. A difficult task for naval staffs would be to evaluate their own and potential enemy ships and weapons to enable them to say at what range, and in what tactical circumstances, a submarine would have such a 10 per cent chance of achieving a hit. The considerations which naval staffs would have to evaluate would be escort and helicopter disposition on the



screen, speeds of advance of surface vessels and speeds available to the submarines. The ranges of the weapons on both sides would be most important, as would be the failure rate of these weapons and the efficacy of countering tactics employed by the defending force. Sonar conditions would be a most important factor as they would dictate the ranges at which forces could expect to detect each other. The assessment would also need to be made of the human factors, the state of training, determination and morale of the men who man the aircraft, ships and submarines involved.

A final assessment could run along the lines that given a surface A.S.W. force of six escorts, twelve helicopters and five long-range maritime aircraft for distant support; and a unit of four major vessels to protect; and given that opposing submarines were armed with 40-knot torpedoes of maximum range 10,000 yards, then the range at which a submarine could normally expect a 10 per cent chance of a hit would be 8,000 yards. The running time of the torpedoes would be of the order of just over six minutes, unless the target is approaching the torpedoes.

If the submarine were armed with missiles capable of a range of sixty miles the problem would be different. This distance is well outside the range at which sonar-fitted escort vessels can expect to make a detection. In this case perhaps the maritime aircraft would be justified in assuming a submarine at a range of fifty miles from the task force was in a 'threatening posture', particularly if the opposing nation had an aircraft, or even satellite, in position to guide the missiles to their homing terminal.<sup>1</sup> On the other hand, the submarine may well be in innocent passage and an attack at such a range from the main force may be hard to justify. The movements of the submarine, or submarines, could provide evidence as to intention. A course which was taking them along well-known shipping routes, and well clear of the task force, would be quite different from one which was designed to shadow, or even intercept that force. Should the surface-force commander order his force to change course, and should the submarine make a similar commensurate alteration this could be construed as significant, but it might equally be coincidental.

So also would be the situation where submarines are deployed near a strait or channel through which the task force must pass. The submarines could claim the freedom of the high seas, and they would be justified in so doing. On the other hand, the naval commander may be foolish to take his force through waters where ranges would be so short that the submarines could hardly fail to hit should they decide to attack. A torpedo salvo fired at a capital ship at 3,000 yards would have at least an 80 per cent chance of achieving some hits.

Perhaps one answer to the problem would be to allow for the creation of

<sup>1</sup> See below, p. 61.

operational zones in the high seas about surface task forces. Information on extent and duration of such a zone would be widely disseminated in diplomatic and naval circles so that all mariners would be aware of its existence. The zone could be a moving circle centred on the task force and extending to the effective weapon range of likely submarine opposition. A submarine found submerged in the zone would be liable to immediate attack as being in a 'threatening posture'. A problem which would arise is that a predetermined and published position and speed of advance of a task force would often be necessary, and nations are loath to advise the movements of their forces for obvious reasons. Without such notice, however, submarines submerged on innocent passage may find themselves inadvertently within such a zone and so liable to attack. The detection, attack and destruction of a submarine in these circumstances would be regrettable.

The notion of operational zones is far from new. They were employed in both World War I and World War II, and are even given some unofficial standing in navies in the present day. In World Wars I and II, however, these zones were approached from the point of view of economic blockade, and it was usually in virtue of their effect on neutrals that they were declared illegal in the Doenitz trial.<sup>1</sup> The Nuremberg Tribunal said:

The proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question . . . The order of Doenitz to sink neutral ships without warning when found in these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.<sup>2</sup>

The creation of the type of zone under discussion would offer self-defence, and not blockade, as its justification.

#### (e) *Submarines in the Territorial Sea*

The transition of the Soviet Navy from a coastal defence force into an instrument of global sea-power has distorted to the point of contradiction Soviet doctrine on the law of the sea. The great majority of submarines which have been detected in territorial waters in recent years are believed to have been Soviet, and they are rendered vulnerable by the Soviet rejection of the right of warships to traverse the territorial sea which was propounded at a time when the Soviet Union was preoccupied with the security of its own marginal seas.<sup>3</sup> Yet, faced with extended territorial sea claims, the Soviet navy can only complete oceanographical investigations, on which its strategic doctrine is being erected, by submarine invasion of the marginal waters of other nations. This has posed a serious problem for naval staffs around the world, and there is much uncertainty respecting

<sup>1</sup> See above, p. 50.

<sup>2</sup> Op. cit. (above, p. 50 n. 5), vol. 22, p. 558.

<sup>3</sup> Butler, *The Law of Soviet Territorial Waters* (1967), pp. 44-9.

the course of action to be taken by destroyer escorts which make submarine detections in the territorial sea.

Article 14 (6) of the Geneva Convention on the Territorial Sea and the Contiguous Zone provides that 'submarines are required to navigate on the surface and to show their flag'. There is a belief in some naval circles that this is to be read with the statement in Article 14 (1) that 'subject to the provisions of these Articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea', and with the proviso in Article 14 (4) that passage shall take place in conformity with the Convention Articles and other rules of international law, and with Article 16, which concedes that the coastal State 'may take the necessary steps in its territorial sea to prevent passage which is not innocent'; and that it is therefore permissible to attack submarines submerged in the territorial sea. This is an over-simplified analysis. In the first place, it is available only among parties to the Convention because the customary law position is not beyond controversy. Secondly, the relevance of Article 16 depends upon the view that a submerged submarine is not exercising the right of innocent passage at all, as distinct from merely being in breach of a duty to remain on the surface while exercising that right. Thirdly, Article 16 hardly warrants the view that any vessel not engaged in innocent passage may be instantly attacked on that ground alone, for other steps are available before attack becomes a 'necessary step'.

Obviously the question is affected by the issue which has developed between countries such as the Eastern European countries or the Philippines which deny that there is a right of innocent passage for warships at all in the territorial sea, and Western countries which argue that the category of 'ships' to which Articles 14 and 17 of the Geneva Convention apply comprise warships including submarines. On this issue it is not proposed to comment, beyond pointing out that, if warships require prior permission to enter the territorial sea, and this permission is given on conditions only, such as passage of submarines on the surface, the coastal State is in a stronger position to argue that incursion of a submerged submarine into the territorial sea is tantamount to incursion by armed forces on land than it would be if warships do not require permission, and the obligation to traverse the territorial sea on the surface is only ancillary to the right of passage. The claims of the coastal State to use force against a submerged submarine are obviously greater in the one case than in the other.

Certain considerations must be taken into account before an evaluation is possible of the right of a coastal State to attack a submerged submarine in its territorial sea. Where the territorial sea is narrow, and particularly where it is only three miles wide, the likelihood of a submerged submarine contact being there for purposes other than innocent passage is greater



than where it is extensive. The reason is that coastal waters may be hazardous for submarines in transit and such vessels would normally remain further out to sea. This consideration, of course, is minimized when a territorial sea of 200 miles is claimed. In this case it would be reasonable to assume that a submarine in transit will pass through the territorial sea, and under certain weather conditions it may be more convenient, and even necessary in order to avoid damage, for it to do so submerged. The factors that are to be taken into account, therefore, in assessing the innocence or otherwise of a submarine's submerged passage through the territorial sea would appear to be the reasonableness of the use of the territorial sea for transit purposes, which may be in ratio with its extent, the weather conditions at the time, the political climate and most importantly the track taken by the submarine.

It would not be unreasonable for coastal States to require submarines in innocent passage to remain on the surface.<sup>1</sup> Any submarine requiring to dive, for bad weather or other reasons connected with its safety or timely arrival at its destination, could inform the coastal State of its intention and its planned dived course, although it must be remembered that the possibility of its doing so depends upon radio propagation conditions, which can be very difficult, and speed. While this may seem to weaken the argument of those nations claiming that no notification of warship passage is required, it still has grounds in its favour for the safety of life at sea.

It would be possible in bad weather, when sonar conditions are often poor, for two or more submarines to be dived in the same area at the same time. The risk of collision in this case is significant, but could be avoided by coastal States giving instructions to the submarines concerned routing them clear of each other. Submarines which do not conform could be a danger to themselves and others; and, as well, they may not be in innocent passage.

Fitzmaurice argues that 'a submarine that traverses the territorial sea submerged or not showing her flag may possibly not be in innocent passage, but this will not be *because* she is submerged or not showing her flag'.<sup>2</sup> In other words, his argument is that the innocence of the passage is not dependent upon the requirement of surface transit, and the coastal State is only empowered to 'require the warship to leave the territorial sea' under Article 23 of the Geneva Convention. As he poses the question, therefore, it is one of devising means of ordering the submerged submarine to vacate the territorial sea. Most submariners will agree that submergence in the territorial sea for purposes other than avoidance of bad weather,

<sup>1</sup> As in Article 7 of the *Soviet Rules for Visits by Foreign Warships to Territorial Waters and Ports of the U.S.S.R.*, 1960; see *ibid.*, p. 127.

<sup>2</sup> In *International and Comparative Law Quarterly*, 8 (1959), p. 98.

or similar reasons of well being, may be adopting a belligerent posture, if not *vis-à-vis* the coastal State then *vis-à-vis* some other State, and that presence there in these circumstances would not amount to innocent passage. While it is possible, therefore, for a submerged submarine to be in innocent passage through the territorial sea, this is a matter for evaluation on the part of the staff which studies the submarine's behaviour, and the chances of its not being in innocent passage are high.

The question that then arises is what measures of force are to be taken against such a submarine. On 26 October 1961 the Soviet Union issued a press release in which it 'charged foreign submarines' with violating Soviet territorial waters, and announced that they would be destroyed.<sup>1</sup> The Swedish Navy has launched depth charges at two submerged contacts in the Swedish territorial sea, and the Argentinian Navy has done likewise. No publicity has been given to other similar incidents. The details of the Swedish incident are as follows: On 4 October 1966 the Swedish Navy, while on manœuvres, made a submarine contact in territorial waters in the Göteborg estuary. Warning shots were fired and the submarine moved out to sea.<sup>2</sup> On 5 October a further contact was made in the territorial sea, and helicopters dropped warning explosives. The contact moved into the high seas, but several hours later the helicopters made another contact in the territorial sea and dropped depth charges about 500 yards from it. Again the submarine headed out to sea.<sup>3</sup> On 26 October 1966 yet another similar contact was made, and ships and helicopters dropped depth charges after warning shots had been fired. One charge was said to have exploded 100 yards from the contact, and a big patch of oil had floated to the surface.<sup>4</sup>

While the use of force against a submerged submarine in the territorial sea is not ruled out, on the argument that entry of a warship for purposes other than the purpose of innocent passage is an intrusion upon national territory and may be repelled just as a military intrusion on land may be, every measure should be taken short of force to require the submarine to leave, as provided by Article 23 of the Geneva Convention. In the case of a conventional submarine it is possible for the destroyer escort to maintain close contact until the submarine is obliged to snort, whereupon tactics may be employed to make it surface. In the case of a nuclear-powered

<sup>1</sup> *New York Times*, 26 October 1961, p. 6, col. 3. The Soviet rules (op. cit., above, p. 57 n. 1) do not explicitly state that submerged submarines will be attacked, but the legislation of Bulgaria and Roumania does: U.N. Leg. Ser. *Law and Regulations on the Regime of the Territorial Sea*, ST/LEG/SER. B/6, pp. 81, 241.

<sup>2</sup> *The Times*, 4 October 1966, p. 8.

<sup>3</sup> *Ibid.*, 5 October 1966, p. 5.

<sup>4</sup> *Ibid.*, 26 October 1966, p. 1; 28 October 1966, p. 14. On 8 December 1969 a Malaysian naval vessel interrogated a Soviet submarine which was hove to and effecting repairs in Malaysian territorial waters. The Malaysian Government made the following statement: 'It is an aspect of international practice that all naval vessels entering the territorial waters of any country would initially request the latter's permission. The exception is when a naval vessel is in a state of distress, which is the case in this instance.' Press Release, 12 December 1969.

submarine—which, because of its size, would normally use only deeper territorial waters and is not, therefore, likely to be a problem for countries with restricted or shallow territorial seas—this tactic may not avail. It is possible to fire a mortar bomb to explode within half a mile of the submarine, which would be the equivalent of a shot across the bows, and warning may be given by dropping hand grenades. Only when these measures, protracted and exasperating though they may be, are exhausted should mortar bombs be resorted to by the surface vessel or aircraft.

The United States Navy T.A.C.A.I.D. provides for what have become known as 'Uncle Joe Procedures' for requiring submarines submerged in the territorial sea to surface immediately or face attack. These include the dropping of T.N.T. charges or hand grenades to make five underwater sound signals at two-second intervals. The Soviet Navy understands and generally conforms with these procedures. However, instruction respecting them has not been consistent or universal, and although they have been adopted by N.A.T.O. they have been neglected by N.A.T.O. forces because of the limited problem that has arisen in European territorial waters, and because of a particular problem with nuclear submarines. Wider dissemination of the procedures would seem to be desirable so that international practice can be consolidated.

The consideration that human life is involved in the tactics to be employed against a submerged submarine in the territorial sea is proportional to the military threat prevailing at the time to the security of the coastal State. A navy engaged in limited warfare may have every justification based on self-defence in employing its A.S.W. weapons against such a contact, and if the contact happens to be made by the belligerent nation, it must be regarded as responsible for its presence in a tactically threatening situation. It must also be remembered that self-defence operates both ways. A submarine which is attacked in the territorial sea may be justified in responding to the attack by torpedoing the surface vessel, so that a clearer appreciation of the delicate issues involved in the exercise of the right of innocent passage than has hitherto prevailed would seem to be incumbent.

#### *(f) A.S.W. and Hospital Ships*

The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949,<sup>1</sup> prohibits the attack or capture in any circumstances of hospital ships, which are to be at all times respected and protected, on condition that their names and descriptions have been notified to the parties to the conflict ten days before those ships are employed. Under Article 30 the High Contracting Parties undertake not to use these vessels for any military

<sup>1</sup> *United Nations Treaty Series*, vol. 75, p. 85.



purpose. In recent operations the question has arisen whether interrogation of wounded prisoners of war in hospital ships is a use thereof for a military purpose. Article 34 lays down that hospital ships may not possess or use a secret code for their wireless or other means of communications. This also has given rise to questions in recent operations. Does it exclude the use of cryptographic signal equipment? The considerations which motivated the drafting of Article 34 are now outmoded. Modern methods of communication are such that signalled instructions 'in clear' to a hospital ship will be widely broadcast. If the instructions are to take station at a certain position this could be a clear indication of an impending amphibious operation near that position. Such a risk of disclosure cannot be taken by an operational staff. On the other hand, considering the availability of the logistic helicopter, orders in writing can easily be transmitted. This is a question which the International Committee of the Red Cross should take into consideration.<sup>1</sup>

Another question which it should consider is the means of positive identification of a hospital ship. Article 43 provides for the painting, marking and illumination of hospital ships, but this was drafted with the tactical situations of World War II in mind. Even when submarines invariably used an attack periscope in order to fire torpedoes, this method of identification was only barely satisfactory because of the poor visibility often obtained through the periscope. But the possibility of attack by means of electronic sensors while a submarine is below periscope depth means that identification by the submarine of a contact as a hospital ship is impossible. The submarine may detect from the noise of the contact's engines what category of ship it is, but it cannot distinguish the use to which the ship is put.

The modern equivalent of the emblematic requirements of Article 43 is a sonar emission of a frequency and pattern peculiar to hospital ships, so that a submarine making contact will be warned of the use to which the contact is put. To the objection that any ship might transmit an identical signal as a *ruse de guerre* it might be argued that this is no different a problem from disguise of a ship in the emblems of a hospital ship, which in fact did not occur in World War II. Since the hospital ship will remain a matter of paramount interest to the international community its effectiveness should be guaranteed by revision of the Convention to take account of a radically altered situation. Article 43 does admit the possibility of the parties to a conflict concluding mutual agreements in order to use 'the

<sup>1</sup> In *The Ophelia*, [1916] 2 A.C. 206 the condemnation in prize of a German hospital ship by the English Prize Court was upheld on the ground that she was in fact put to a military purpose, and had been engaged in signal traffic by code. The records of this traffic were destroyed by the crew to prevent their capture. The legitimacy of this decision was debated. See authors listed in Oppenheim, *op. cit.* (above, p. 19 n. 1), p. 505 n. 2.

most modern methods available to facilitate the identification of hospital ships'. Recent hostilities, however, have occurred in a political atmosphere which is not conducive to the rapid negotiation of such agreements, and one must be sceptical as to their likelihood in future conflicts. The only remedy would be for the Convention to be amended so as to authorize the International Committee of the Red Cross to promulgate a recognition signal for hospital ships.

## 2. Self-Defence Against Missile Threat

### (a) *Technological Considerations*

There are four types of naval missiles: surface-to-air, surface-to-surface, surface-to-submarine (the last an air missile used in sea warfare), and air-to-surface. There are also two modes of propulsion at present, namely solid fuel and liquid fuel. Both suffer from defects which affect operational success. Solid fuel is robust and easy to handle, but it suffers from the disadvantage that once the fuel has been cast in the missile the burning rate is fixed and not controllable. Also, defects in casting can sometimes affect the burning rate of solid fuel, thus affecting the range and speed of the missile. Liquid fuel is unstable and difficult to handle, and the components require a great deal of maintenance to keep them in a safe yet ready state. The advantage of liquid fuel is that the power thrust is controllable by admitting only the amount of fuel required for a desired manoeuvre. Larger rockets have usually employed this method of propulsion.

Guidance of the missile in flight may be contrived according to any one of eight systems:

(i) *The beam-riding system.* The missile is guided down a beam after launching in a pre-set direction and collected within the beam of the radar set. Its sensors monitor the beam and by means of automatic movement of ailerons and rudder keep the missile in the centre of the beam. If the beam is kept firmly on the target, a hit should result.

(ii) *Semi-active homing.* The ship's radar illuminates the target and the missile's own radar receiver detects the echoes of the ship's radar reflected by the target. The missile guides itself to the target on these echoes.

(iii) *Active-homing.* The missile has its own radar transmitter and homes on the target by means of the returning echoes.

(iv) *Infra-red homing.* A sensitive receiver in the missile scans the sea or air, and when it detects a heat source locks on to it.

(v) *Anti-radiation homing.* The missile homes on to the radar emissions of the target.

(vi) *Radio command.* The missile is guided by manual remote control

in the ship on the part of an operator who observes the target visually or by radar. Guidance signals are transmitted by a joystick control.

(vii) *Inertial navigation*. Used in ballistic missiles this will in future be available for medium-range missiles fired outside radar range of the target.

(viii) *Wire guidance*. In short-range missiles guidance is achieved along a wire attached to the missile.

Classification of missiles by reference to their guidance systems is not very helpful, since the same missile may have alternative or fall-back guidance systems, or may have combinations and variants of the eight systems listed above. Inertial navigation may be used for midcourse guidance with any one of several terminal homing methods. Some missiles are guided only in azimuth and are self-controlling for height.

All of these systems are liable to malfunction. N.A.T.O. navies use beam-riding and semi-active homing as well as radio command. In all these cases performance depends on uninterrupted radar reception, and hence countermeasures in the form of jamming the radar beam, by means, among others, of release of reflectors or stand-off jamming aircraft, may distract the missile from the target. Infra-red homing is not liable to this distraction, and at short ranges it may become an acceptable alternative to electronic homing. All surface-to-surface missile systems which do not operate in conjunction with a forward observing aircraft suffer from the swamping of radar by 'sea-clutter', or the echoes of the illumination of the waves by the radar beam.

### (b) *Evaluation of Self-Defence*

The problem posed for international law by the development of this missile capability is that naval doctrine will tend to assume that the best method of self-defence is to strike first. A leading defence journal expresses it thus:

The whole surface-to-surface problem cannot really be said to have been solved by the West. A missile firing ship undoubtedly constitutes an enormous hazard to warships, and the best defence against it is to sink it before it can fire its missiles.<sup>1</sup>

In order to achieve this result, naval thinking is now advancing in the direction of long-range surface-to-surface missiles controlled by forward observing aircraft, and capable of outranging any threatening vessel. Ranges of 150 miles are being spoken of. Unless this advanced tactical thinking is accompanied by evaluation of the situations in which the weapon is to be used in circumstances of limited war or of political tension, it will become most difficult to draft Rules of Engagement which will minimize the threat to peace.

<sup>1</sup> Marriott, 'Naval Missiles', *International Defense Review* (1969), p. 247.



Legal consideration must concentrate on what constitutes an 'armed attack', or 'hostile act', by a missile-armed vessel in conditions of limited hostilities, and what measures of self-defence are proportional to the risk of destruction. As in the case of the problem raised by A.S.W., evaluation can only occur in the context of specific situation-cases, but some factors which are relevant to the concept of self-defence against missile attack may be isolated which do not apply in the case of A.S.W. The sinking of the *Eilat*<sup>1</sup> has engendered much disquiet in naval circles, and has promoted serious and widespread discussion on the need for a tactical doctrine of 'pre-emption', that is, to eliminate the craft of hostile intent merely because of its capability and without awaiting overt action on its part.<sup>2</sup> This thinking is based on the hypothesis, which the *Eilat* sinking is alleged to verify, that the ship against which a missile is launched has little chance of survival. It must be remembered, however, that the *Eilat* sinking occurred in conditions exceptionally favourable to an attacker, including launch from a craft alongside in harbour, when the respective positions of launcher and target could be fixed with minimum error, in the most desirable weather conditions, and against a ship which had no capability of intercepting the missiles except by means of gunnery. While surface-to-surface missiles thus constitute a serious threat, they are in fact not so reliable as to imply the automatic destruction of the target. The failure rate in launchings is high, the chances of interception by the target's surface-to-air missile are good, the decoys are also reasonably effective, and evasive tactics of the target are helpful. But these are considerations which time and technological development will quickly change.

The problem reduces itself to one of estimating the risk of awaiting launch of a missile, and thus one of calculating the time-scale of reaction and interception. A missile travelling at the speed of sound and launched at a range of fifteen miles will take about seventy-five seconds to reach the target. It will take the target's radar scanner some seconds to detect the missile, and it will take additional time to evaluate the situation, decide on counter-measures and release the target's missiles on an interception course. It now becomes a question of calculating the chances of the target's being hit, supposing it cannot intercept the missile much outside the radius of damage. In many cases the missile will be 'beam-riding', and the target can identify by means of E.C.M. when the potential attacker's radar guidance system has 'locked on' to the target. It is arguable that that is the moment of 'armed attack', and that it is at that moment that measures of force in self-defence may be taken. It then becomes a question of determining whether

<sup>1</sup> See above, p. 28.

<sup>2</sup> 'The Aftermath of *The Eilat*, *United States Naval Institute Proceedings*, vol. 95 (1969), p. 61.

missiles shall be fired at the threatening vessel, which will be possible in the time-scale before the target's own missile system becomes totally engaged in interception of the incoming missile. The question for discussion is whether this is the only measure of 'pre-emption' permitted by international law. In other cases the missile will be self-homing, in which case it is launched towards an 'acquisition area', and there is no means of anticipating it prior to launch. This was the case with the Styx missiles that sank *the Eilat*.

In the case of long-range missiles of up to 100 miles the problem is more difficult, for, due to the curvature of the earth, these may be most effectively used against surface targets when guided from aircraft after launch, or in the future from satellites. In this case the guidance radar will be flooding the target area with illumination, and the echoes from the target will be intercepted by the missile. There is no E.C.M. method whereby the target can detect that a missile is being guided, but the missile may be tracked once it is launched. In this case the time-scale for reaction and interception is much larger, and measures can be taken against the aircraft if it has been positively identified. At present there is little disquiet respecting the capability of long-range surface-to-surface missiles, because of the greater range of possible failure, and it is sufficient for immediate purposes to investigate the question of self-defence against short-range missiles.

The future problem may centre on infra-red homing of missiles, which eliminates the radar guidance system, and hence the detection of intent to launch. But the acquisition range of such a missile is short, due to the rapid attenuation of heat, and at present the attacker would have to close the range to the point where the target's own means of reaction would be more effective.

If naval doctrine develops—as it appears to be doing—in the direction of requiring the destruction of a potentially hostile vessel before it can launch its missiles the concept of a 'hostile act' which was earlier referred to as the basis for an exercise of the right of self-defence will have to be revised. It is difficult to see how this can be done without further reflection on the role that international law plays in containing the use of force.

### *(c) The Effect of Missile Capability on Innocent Passage*

It is not the purpose of this paper to discuss the extensive materials available for a study of the right of innocent passage of warships through the territorial sea. It is sufficient to assume for present purposes that such passage, at least through straits, is authorized by international law, and then to pose the question whether the arming of ships with missiles imposes upon warships any particular obligations while engaged in innocent

passage. In the *Corfu Channel* case the International Court of Justice adverted to the procedures respecting armament of warships passing through straits as follows:

It is known from the above-mentioned order issued by the British Admiralty on August 10th, 1946, that ships, when using the North Corfu Strait, must pass with armament in fore and aft position. That this order was carried out during the passage on October 22nd is stated by the Commander-in-Chief, Mediterranean, in a telegram of October 26th to the Admiralty. The guns were, he reported, 'trained fore and aft, which is their normal position at sea in peace time, and were not loaded'. It is confirmed by the commanders of *Saumarez* and *Volage* that the guns were in this position before the explosions. The navigating officer on board *Mauritius* explained that all guns on that cruiser were in their normal stowage position. The main guns were in the line of the ship, and the anti-aircraft guns were pointing outwards and up into the air, which is the normal position of these guns on a cruiser both in harbour and at sea. In the light of this evidence, the Court cannot accept the Albanian contention that the position of the guns was inconsistent with the rules of innocent passage.

In the above-mentioned telegram of October 26th, the Commander-in-Chief reported that the passage 'was made with ships at action stations in order that they might be able to retaliate quickly if fired upon again'. In view of the firing from the Albanian battery on May 15th, this measure of precaution cannot, in itself, be regarded as unreasonable. But four warships—two cruisers and two destroyers—passed in this manner, with crews at action stations, ready to retaliate quickly if fired upon. They passed one after another through this narrow channel, close to the Albanian coast, at a time of political tension in this region. The intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships. Having regard, however, to all the circumstances of the case, as described above, the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.<sup>1</sup>

Two aspects of this part of the judgment call for comment: the first is the innocence of warships in passage whose armament is ostensibly in a 'stowed' position; and the second is the right of warships in time of tension to be cleared for action and in a posture of self-defence while exercising the right of innocent passage. What is the equivalent in the case of missiles of guns being 'trained fore and aft'? It will be noticed that the Court emphasized not only the stowage of the guns but the fact that they were unloaded, a fact to be presumed by the shore observer from the training of the turrets. A missile on the launcher is at instant readiness, and it is a matter of seconds to train the launcher and discharge the missile. The question thus arises whether warships engaged in innocent passage must have their missiles housed, and whether their loading on the launcher negatives the innocence of passage. It can only be analysed after considering whether, supposing a missile threat to the ship is possible, the ship is adequately in a state of self-defence by having its missiles housed. This

<sup>1</sup> *I.C.J. Reports*, 1949, p. 4. For the British argument on this point see *I.C.J. Pleadings*, vol. 3, p. 210.



involves analysis of the time-scale within which response to a missile attack must be made. In the case of missiles whose electronics require to be warmed there is a delay of about a fifth of a minute before the missile is activated. In the case of more modern transistorized missiles this delay is eliminated, so that the whole process of loading, training and launching the missile from its housed position will in future be much less than half a minute. The question is whether the ship is at a disadvantage for purposes of defence against a missile by the few seconds required to load its own missile. If the answer is negative it would be reasonable to suppose that the equivalent of main armament stowage would be housing of the missile.

In fact in many cases, notably of the missiles Styx, Exocet and Gabriel, the missiles are normally carried on the launchers, which may be either fixable or trainable. To the naval mind the Court's emphasis on the normal stowage of the armament is a legal quibble, since the delay to load, lay and fire a gun is much less than to load, ready and fire a missile. The importance of the Court's point is, however, the psychological reaction of the shore-based observers, not the readiness of the ship.

The arming of ships with missiles has also raised the question of the definition of a 'capital ship' for purpose of passage into the Black Sea. Annex II of the Montreux Convention, 1936,<sup>1</sup> defines capital ships as surface vessels of war belonging to one of the two following sub-categories:

(a) Surface vessels of war, other than aircraft carriers, auxiliary vessels, or capital ships of sub-category (b), the standard displacement of which exceeds 10,000 tons (10,160 metric tons), or which carry a gun with a calibre exceeding 8 in. (203 mm.)

(b) Surface vessels of war, other than aircraft carriers, the standard displacement of which does not exceed 8,000 tons (8,128 metric tons) and which carry a gun with a calibre exceeding 8 in (203 mm).

Under the terms of the Convention only Black Sea Powers may send capital ships through the Turkish Straits. The revolution in weapon capability has now raised the question whether vessels which are conventionally designated as cruisers or destroyers may not in fact be capital ships within the meaning of (b) above.

In December 1968 the United States Sixth Fleet announced that the destroyers *Turner* and *Dyess* would enter the Black Sea for 'routine operations', and that the ships' armament did not contravene the limits laid down by the Montreux Convention since they were light surface vessels with a displacement of less than 10,000 tons and did not carry a gun of a calibre larger than 203 mm. *Dyess*, however, was armed with Asroc anti-submarine missiles of 305 mm. Upon this announcement the Soviet Union addressed a Note to the Turkish Government claiming that passage of the destroyers would violate the Montreux Convention. Turkey's

<sup>1</sup> *League of Nations Treaty Series*, vol. 173, p. 213.

Foreign Minister rejected the Note, saying he 'interprets the Montreux Convention; what we say goes'. The ships were said to be within the tonnage and arms limit set by the Convention.<sup>1</sup>

Although issues respecting the limitations of the Montreux Convention have not yet been acute, it may be expected that pressure upon Turkey will mount, since it is clear that missile-equipped ships, and even ships with conventional guns of less than 8 in. but with self-propelled projectiles, have a capability at least equal to, and certainly a range far in advance of, the capital ships that existed in 1936.

### 3. Naval Bombardment and the Hague Rules

The Convention respecting Bombardments by Naval Forces in Time of War adopted at The Hague in 1907<sup>2</sup> forbids the bombardment by naval forces of ports, towns, villages, houses or buildings which are undefended. However, this prohibition does not extend to military works, arms depots, or installations used for the purposes of an enemy army or navy. The naval commander may destroy these if, after summons and appropriate delay, they are not destroyed by the enemy; and no responsibility for involuntary damage which is occasioned by such bombardment arises. Even when military necessity requires immediate bombardment, undefended towns remain immune. All efforts must be made to avoid damage to buildings of cultural, artistic, scientific or benevolent character, and these are to be identified with visible signs by the inhabitants.

Needless to say these provisions were drafted for tactical situations which have long since become irrelevant, but the central principle which they enshrine, namely the obligation to restrict shelling to military targets and to avoid unnecessary damage to civilians, remains as the dominant consideration in the drafting of Rules of Engagement for modern situations. The *Institut de Droit International* at its Edinburgh session resolved:

1. The obligation to respect the distinction between military objectives and non-military objectives as well as between persons participating in the hostilities and members of the civilian population remains a fundamental principle of the international law in force.

2. There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.<sup>3</sup>

It must not be forgotten that claims respecting damage to or destruction of

<sup>1</sup> *The Times*, 10 December 1968, p. 1.    <sup>2</sup> *British and Foreign State Papers*, vol. 100, p. 389.

<sup>3</sup> Resolution adopted concerning the distinction between military objectives and non-military objectives in general and particularly the problems associated with weapons of mass destruction, 9 September 1969.

civilian property owned by nationals of States other than the combatant parties may be made, so that the legal issue is not one merely as between those parties.<sup>1</sup>

Since 1907 the problem of distinguishing military from civilian targets has been magnified by the involvement of the civilian population in the logistics of war, so that observance of the principle enunciated by the Institut is in practice much more difficult than it has ever been. This is particularly the case in such a situation as Vietnam, where the distinguishing indices of military and civilian targets are almost non-existent. There remain, however, certain considerations which should be kept in mind, and which, indeed, have dominated the drafting of Operational Orders in Vietnam. The first of these is the fact that technological development has intensified the degree of accuracy of naval gunfire to the point where in fact damage to non-military features can be virtually eliminated except by accident. This follows the computerization of gunfire. Whereas in 1907 targets were selected by rangefinder and line director, with only primitive methods for verifying speed, current and ballistic considerations, advanced methods are now available. The ship's position is fixed by visual and radar methods. The course, speed and tidal stream factors are fed into the computer in the gunnery control centre (TS/gunplot) by gyro and log. Radar fixing constantly updates the ship's position and provides a means of accurately compensating for unpredictable changes in the direction and speed of the tidal stream and the effect of wind on the ship's track. It is thus possible to keep the gun target line constantly updated. As corrections are made from a ground or aircraft spotter these are applied as a N/S or E/W variation. The ballistic factors are updated at regular intervals. Visual, and radar fixing always has a margin of error, and both the gyro and magnetic log may be marginally inaccurate. The compounded errors mean that normally the initial rounds will fall off target, and several corrections may be necessary before the target is bracketed. However, in good conditions, it is reasonable to expect that the first fall of shot will be within several hundred metres, and corrected fall less than 100 metres, of the target co-ordinates.

It should be borne in mind that this level of accuracy is only achievable in conditions where the ship's gunnery team is well trained, the gunnery system is properly tuned and correctly aligned and radar conditions and visibility enable the navigator accurately to fix the ship. These are the factors which a ship's captain must evaluate, and where conditions are marginal, or worse, then the captain would have to accept some blame for rounds which fall well away from the target.

<sup>1</sup> Schwarzenberger has assembled a large number of judicial decisions and other cases relating to such claims: *op. cit.* (above, p. 19 n. 1), pp. 403-7.



In good conditions, however, this accuracy means that the ship's gunnery officer has the competence to minimize damage to civilian personnel and facilities, so that observance of the principle in the Hague Convention becomes basically a question of target selection. This is done mainly by ground-based or aerial observation, and even though naval officers may be instructed on the need for evaluation of targets to avoid unnecessary civilian loss, such loss may occur through inexperience, negligence or indifference of spotters. The development of communications to the point where the spotter in the air speaks directly to the gunnery officer in the ship, involving as it does rapid changes of target, has magnified the risk of indiscreet evaluation. It should be a primary concern of defence forces to instruct shore or aerial observers more closely than has been the practice in the need to respect the principle in the Hague Convention and to take care in evaluation.

#### V. NAVAL CONTROL OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE

A principal task of modern navies is policing the maritime areas of national jurisdiction, which fall into four categories: inland waters, territorial waters, the contiguous zone and exploitable areas of the continental shelf beneath the high seas. In each instance naval operations must in normal circumstances be confined to exercising such jurisdiction as international law concedes to the coastal State, and the limitations inherent in this jurisdiction must be imported into operational orders. This is particularly the case with respect to fishery protection. States may in fact base their fishery conservation policies on varying alleged international legal foundations: (1) They may have a territorial sea of less than twelve miles and a fishery zone occupying the remaining area up to twelve miles. (2) They may by treaty with other nations create a conservation zone beyond the twelve-mile limit, in which case operational orders must correspond with the concessions made in the treaty by the other party. (3) They may extend their territorial sea to distances of more than twelve miles and thereby seek to exclude foreign fishing from the waters in question. Or (4), they may unilaterally create extended fishing zones beyond the territorial sea and the contiguous zone.

The parties to both the Geneva Conventions on the High Seas and the Territorial Sea and Contiguous Zone may well be more restricted in their freedom to adopt alternatives (3) and (4) than States which have refrained from ratifying these instruments and have relied upon dynamic customary international law to validate their claims. No party to the Conventions has extended its territorial sea beyond twelve miles or created a contiguous

zone or fishing zone beyond that limit. This may be because, even though the Conventions do not specify the extent of the territorial sea, they none the less embody restrictions upon it. Article 1 of the Convention on the High Seas defines the high seas as all parts of the sea that are not included in the territorial sea or in the internal waters of a State, while Article 2 specifies that the high seas are free for fishing. Article 24 of the Convention on the Territorial Sea and the Contiguous Zone defines the contiguous zone as a zone of the high seas contiguous to the territorial sea, and lists the purposes for which the zone may be established. These purposes do not include fishing. The same article states that a contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured, so that there may be a contiguous zone only in respect of the distance between the territorial sea as proclaimed in municipal law and the twelve-mile limit. If a twelve-mile territorial sea is proclaimed there would be no contiguous zone. And since the contiguous zone is of its nature additional to the territorial sea, it would seem to be a necessary implication that no party to the Convention on the Territorial Sea and the Contiguous Zone may claim more than a twelve-mile territorial sea.

The freedom of a party to the Geneva Convention to create a fishery protection zone of up to twelve miles has not been contested in practice,<sup>1</sup> though a literal interpretation of the Convention would make it questionable.<sup>2</sup> A State which retains a three- or six-mile territorial sea might argue that it is entitled to exclusive fishery within the remaining nine or six miles because it could have achieved this, had it chosen, by extending its territorial sea to twelve miles.<sup>3</sup> It could scarcely be penalized for its restraint. But the fact is that the sea beyond territorial waters is high seas, the high seas are proclaimed to be free for fishing, and fishing is not one of the interests covered by the contiguous zone. If a contiguous zone for fishery purposes is legitimate this can only be in virtue of a gloss upon the Conventions which practice has contrived. The Vienna Convention on the Law of Treaties does not explicitly recognize such glosses. The nearest it comes to doing so is the provision in Article 31 that account may be taken in the interpretation of a treaty of subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its

<sup>1</sup> Eleven countries with less than a twelve-mile territorial sea have a twelve-mile fishery limit, and another nine, which are parties to the European Fisheries Convention, 1964, and have less than a twelve-mile territorial sea, have a twelve-mile fishery zone for treaty purposes.

<sup>2</sup> The inclusion of fishing in the contiguous zone was adopted at Geneva by the First Committee by votes 37:35:9: *Official Records*, vol. 3, pp. 176-7; but rejected by the plenary session by votes 35:30:20: *ibid.*, p. 39. See Johnston, *International Law of Fisheries* (1965), p. 225; Oda, *International Control of Sea Resources* (1963), p. 19; Garcia Amador, *The Exploitation and Conservation of the Resources of the Sea* (1963), p. 66.

<sup>3</sup> Gottlieb in *Canadian Year Book of International Law*, 11 (1964), p. 72; Morin, *ibid.*, p. 87.

interpretation. It could be argued that so extended a modification of the 'ordinary meaning to be given to the terms' of the Geneva Conventions 'in their context' as the addition of fishery to the other listed incidents of the contiguous zone, goes beyond an 'agreement regarding interpretation'. The point is important for federal States where the valid exercise of constitutional power with respect to fisheries may depend upon the municipal courts' finding that the Geneva Conventions have been strictly implemented. A constitutionally invalid exercise of power might deprive a naval officer who acts pursuant thereto of all legal protection.

The States which have utilized techniques (3) or (4), all of them non-parties to the Geneva Conventions, have established an advantage, not only respecting the area of water which is affected by the exercise of national jurisdiction, but also in the degree of freedom allowed to their navies in the policing of those waters. Parties to the Conventions have been more cautious than non-parties in the instructions issued to naval patrol vessels respecting the degree of force to be employed in the matter of hot pursuit and in arrest both within proclaimed waters and beyond.

#### 1. Pursuit of Fishing Vessels

Operational instructions to fishery protection vessels must envisage the situation where a foreign fishing vessel is discovered in the act of fishing in a proclaimed area but refuses to submit and flees. The occasions when force may be used, and the extent of that force, are matters of doubt in the minds of naval staffs engaged on the drafting of these instructions. The parties to the Geneva Convention on the High Seas are limited by Article 23 which authorizes hot pursuit of a foreign ship when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State.<sup>1</sup> There is no doubt that if a foreign fishing-boat is detected in breach of fishery laws within the territorial sea it may be arrested there, and pursuit may begin there. But if it is detected in a proclaimed fishery zone additional to the territorial sea the right of arrest would seem to depend on whether practice has validated the creation of fishery zones which are spatially coincidental with the territorial sea and the contiguous zone as defined in the Convention. But may pursuit begin in such a fishery zone, even if arrest is permissible? Given that the zone is high seas and not a contiguous zone within the literal meaning of the Convention, there must remain some doubt about the matter, and this doubt will necessarily affect the degree of force to be employed.

<sup>1</sup> Brock in *The JAG Journal of the United States Navy*, 18 (1960), p. 18; Sherlock in *Revue de droit pénal militaire et le droit de la guerre* (1968), p. 7. Cf. Poulantzas, *The Right of Hot Pursuit in International Law* (1969), p. 185.



Article 23 of the Convention states that hot pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, even if the pursuing ship is not within one of these areas when it orders the offending vessel to heave to and receive a boarding party. It then goes on to state quite explicitly that if the foreign ship is within the contiguous zone the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established, and these are limited in Article 24 and do not include fishing.

On a literal interpretation of the Convention, therefore, there would appear to be no right to pursue a foreign fishing vessel for breach of a fishing law or regulation which takes place outside the territorial sea, and such a right would seem to depend upon the acceptance of the argument that international practice has validated the institution of fishing zones up to twelve miles from the coast, not only for purposes of the jurisdiction to prescribe, but also for purposes of the jurisdiction to enforce. The difficulties of the matter were adverted to by Fitzmaurice when the relevant articles were under discussion in the International Law Commission. He argued that a State exercises in the contiguous zone, not rights, but an enabling police power derived from international law, not from municipal law. A coastal State may lawfully exercise such power 'if it can', but 'foreign vessels are not fundamentally obliged to submit' to it 'except in so far as they must':

Foreign vessels in the contiguous zone are not basically *subject* to the laws of the coastal State, or bound to conform to them, as they would be if it were the territorial sea; nor are they, in principle, obliged to submit to the control of the authorities of the coastal State, as they would be in the territorial sea. International practice allows, or—more probably—tolerates, that the coastal State should exercise certain limited powers of control in the contiguous zone in order to enable it to prevent *eventual* infringement *within its territory or territorial waters* of certain of its laws.<sup>1</sup>

This view of the matter led Fitzmaurice to interpret Article 23 of the Convention as permitting hot pursuit to begin in the contiguous zone only in respect of a violation of the coastal State's law which occurred in the territorial sea or inland waters;<sup>2</sup> and that an incoming vessel, although it is

<sup>1</sup> *This Year Book*, 31 (1954), p. 379. See also 'U.N. Conference on the Law of the Sea', *Official Records*, vol. 3, p. 10.

<sup>2</sup> *International and Comparative Law Quarterly*, 8 (1959), p. 112. This view is contested by McDougal and Burke, *The Public Order of the Oceans* (1962), p. 629, on the basis of 'factors which have caused States for some decades to assert, and reciprocally honor, claims to an occasional, exclusive competence to apply authority beyond their territorial sea'. Also Harlow in *The JAG Journal of the United States Navy*, 23 (1968), p. 89. But Dean shares Fitzmaurice's doubts in *American Journal of International Law*, 52 (1958), p. 624. The *Michigan Law Review*, 62 (1964), p. 859, points out that 'if the drafters intended the contrary result, they should have inserted another paragraph to the effect that prevention or punitive actions may not be taken in the contiguous zones'. See Bowett, *op. cit.* (above, p. 25 n. 4), p. 83; cf. Poulantzas, *op. cit.* (above, p. 71 n. 1), p. 185.

not entitled to resist visit and search, is immune from the exercise of force if it manages to avoid visit and search.

This view of the nature of the contiguous zone renders it specially difficult to vindicate a right of hot pursuit respecting a breach of a fishery regulation occurring in a proclaimed fishery zone adjacent to the territorial sea. Indeed, Fitzmaurice altogether excluded the possibility of creating such a zone on the ground that Article 24 excluded fishery from the contiguous zone, and that even the addition of fishery to the contiguous zone would not result in the conferring of an exclusive fishery right in that zone, let alone a right to pursue fishing vessels for breaches of fishery regulations occurring within that zone.<sup>1</sup> A right of hot pursuit might be founded on the argument that practice of nations has resulted in the creation of an exclusive fishery jurisdiction over coastal waters which is altogether outside the scope of the Geneva Conventions, but the difficulties in establishing this case are considerable, given the wording of the Convention. It is one thing to concede that the coastal State may require a foreign fishing vessel to leave the proclaimed zone, but it is another thing to say that it may arrest it by force. It might be necessary to establish that the practice of States favoured this additional competence.

It is not the purpose of the present discussion to resolve this difficult question of law, but to point out that naval staffs engaged in the drafting of instructions to fishery patrol boats have been provided with a confused brief by the lawyers, and that as a result these instructions are either ambiguous in detail respecting the situations that may occur, or dangerously rash respecting the limitations on the freedom of action of the commander. The difficulties that can arise, even in the case of hot pursuit beginning in and respecting an offence in the territorial sea, are evident from a consideration of the *Red Crusader* case.<sup>2</sup>

On 29 May 1961 the Royal Danish Navy fishery protection vessel *Neils Ebbesen* plotted the position of the British trawler *Red Crusader* by the double-angle method and by taking radar distances and bearings to points on the coasts of the Faeroes. The *Red Crusader* was then within the line agreed upon between Denmark and the United Kingdom as the limit of Danish exclusive rights. The *Red Crusader* took in her gear and trawl-net, although her speed at all relevant times was too great to stream the net, but not too great to proceed with the trawl in the water. The trawler ignored several stop signals by siren and searchlights until a blank 40-mm. shot was fired across her bows, whereupon a boarding party was put into her by the *Neils Ebbesen*. At the same time both radar display units in the *Neils*

<sup>1</sup> Loc. cit. (above, p. 72 n. 2), p. 118.

<sup>2</sup> *International Law Reports*, vol. 35, p. 485; *Revue générale de droit international public*, 66 (1962), p. 597; *British Practice in International Law* (1962), p. 50; Timsit in *Annuaire français de droit international* (1963), p. 460.

*Ebbesen* were checked, and one measured 8.4 miles and the other 8 miles from a point on the coast. By a double-angle fix the distance was found to be 8.6 miles. An arrest was then effected. However, the skipper of the *Red Crusader* locked up the boarding party and the trawler sought to escape, followed by the *Neils Ebbesen*. After half an hour the *Neils Ebbesen* fired one round of 127 mm. shot astern of the trawler, and another ahead, while signalling to heave to. Fire was then opened on the *Red Crusader's* radar scanner, and lights, and eventually a round of 40 mm. hit the stern. All firing was by solid shot and took place in Danish territorial waters. The firing ceased, and the *Red Crusader*, followed by the *Neils Ebbesen*, headed for British territorial waters. H.M.S. *Troubridge* interposed herself between the two vessels, so, according to Denmark's protest to the United Kingdom, permitting the *Red Crusader* to escape.

In a diplomatic exchange between Denmark and the United Kingdom, the latter claimed the cost of repairs to the *Red Crusader*. The matter was referred to a Commission of Enquiry consisting of M. Ch. de Visscher, Mr. A. Gros and Captain C. Moolenburgh, which found that the captain of the *Neils Ebbesen*,

... exceeded legitimate use of armed force on two counts: (a) firing without warning of solid gun-shot; (b) creating danger to human life on board the *Red Crusader* without proved necessity, by the effective firing at the *Red Crusader*. ... The Commission is of the opinion that other means should have been attempted, which, if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to the normal procedure.<sup>1</sup>

The Commission found that the captain of H.M.S. *Troubridge* had made every effort to avoid any recourse to violence between the *Neils Ebbesen* and the *Red Crusader*. 'Such an attitude and conduct were impeccable.' The matter was settled after the Commission's findings by a withdrawal of claims and waiver of rights of both parties.<sup>2</sup>

The difficulty in drafting fishery-protection instructions is that the question whether use of weapons is 'excessive' remains a matter of judgment on the part of the captain. That fire may be opened in hot pursuit is beyond question. In the *I'm Alone* case the Commission said that the United States was entitled

... to use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purposes, the pursuing vessel might be entirely blameless. ...<sup>3</sup>

But even in that case the facts were found not to justify the sinking, and

<sup>1</sup> *International Law Reports*, vol. 35, p. 499.

<sup>2</sup> *Hansard*, H.C. Deb., vol. 670, Written Answers, cols. 77-8.

<sup>3</sup> *Reports of International Arbitral Awards*, 3 (1935), p. 1609, at p. 1615. On excessive use of force see Poulantzas, *op. cit.* (above, p. 71 n. 1), p. 236.



the *Red Crusader* case suggests that every device, including presumably harassment by navigational means, must be employed and for a sufficient period of time before force is justified. This puts the commander in a difficult position, for harassment can lead to situations where the Rule of the Road becomes unclear, and a collision may result.

In fact, fire has been opened on several occasions in recent years. The United States protested to the Soviet Union at fire being directed at the American merchant ship *Sister Katingo* in 1964 sixteen miles from the Russian coast, after the captain of that ship had quitted Novorossisk without clearance following an altercation with the Soviet authorities. The Russian action was characterized in a State Department Note as an 'excessive method' of effecting arrest.<sup>1</sup> One of the most energetic fishery-protection actions carried out in recent years was that of Argentina respecting the Soviet fishing vessels *Pavlovo* and *Golfstrim* in 1968. Argentina in 1967 enacted legislation drawing a 200-mile territorial sea from a baseline,<sup>2</sup> and applied thereto a fishery law which requires all foreign fishing vessels to take out a licence and pay royalties in respect of catches within the territorial sea (\$500 and \$10 per ton.)<sup>3</sup> At the same time an agreement with Uruguay enclosed the River Plate, so that the 200-mile line is drawn on the outer side of this baseline. However, no agreement with Uruguay existed respecting the point at which the northern boundary of Argentinian waters is to be fixed, and administratively Argentinian authorities presumed this to be the Uruguayan three-mile limit. In the rectangle thus formed by this northern limit, the closing line and a perpendicular line drawn from the centre of the closing line the two Soviet vessels were detected fishing on 22 June 1968.

When the Soviet vessels resisted an order to stop made by the Argentinian destroyer *Santa Cruz*, and moved towards the high seas, the *Santa Cruz* fired five rounds of explosive shells, as a result of which the *Golfstrim* suffered two holes of 45 mm. in the bow, three metres above the waterline, and a hole of 0.5 mm. below the waterline to port. Four cabins were destroyed. The two ships were then escorted to Mar del Plata, where they were fined \$25,000 and detained for twenty days until the fine was paid under protest by the Soviet shipping agency. The Soviet Embassy in Buenos Aires delivered a Note of Protest against 'the illegal action of the authorities of the Navy'. When a verbal reply was communicated to the effect that the matter was now one for the Argentinian courts no further Soviet protest was made. The Soviet vessel took out the necessary fishing licence, and there the incident ended.

<sup>1</sup> *Revue générale de droit international public*, 68 (1964), p. 938.

<sup>2</sup> *International Legal Materials*, 6 (1967), p. 663.

<sup>3</sup> *Ley No. 17. 500 De promoción pesquera*, 1967.

## 2. Navigational Problems in Arresting Foreign Vessels

For the valid exercise of national jurisdiction it is necessary that the breach of the coastal State's law should occur within the area of proclaimed waters, and that pursuit should begin within the area of waters designated by Article 23 of the Geneva Convention on the Territorial Sea and Contiguous Zone. Proof of the position of the arrested or pursued ship may be required by the Government of that ship or by the municipal courts before which the offending master is prosecuted. International lawyers, legislative draftsmen and even defendant fishermen have paid too little attention to the problem of proof. Instructions to naval vessels engaged on fishery protection have also been general with respect to the recording of evidence as to the offending vessel's position at relevant times, even when they emphasize the importance of exact fixing, and independent checks of fixes, and even when they require the preservation of plotting calculations; and captains of patrol craft have not always, for want of clearer instructions, fixed the respective positions of their own and the offending vessel with the accuracy that a court would require if the matter were contested. Since the navigational questions that arise are important for a range of questions currently under discussion by international lawyers, as well as for fishery protection, it may be useful to advert to them in some detail.

A ship may use the following methods of fixing its position:

(a) *Sights*. By observing the altitude with a sextant and the exact time of the sun, moon, planets and stars, lines of position can be obtained which when combined result in a fix at their intersection. These take time to calculate, require skill and practice to observe, and of course depend upon the sky and horizon being clear. The chronometer must be accurate, although with continuous radio time signals its error is easily known, and the sextant must be well adjusted. The main inaccuracies result from refraction of the line of sight and the uncertainty of the ship's movement between sights. With sun sights refraction is a major source of error, particularly in low latitudes when the sun is high, and when the time between sights required to achieve a suitable change in bearing is normally long enough for errors in the ship's movements to be significant. Such a position may be expected to be erroneous to the extent of from two to four miles. A single sun sight provides a position line upon some point of which the ship will be. The accuracy of running fixes obtained by taking sun sights is only as accurate as the estimate of the direction and distance of the 'run' between the times of the two or more observations. Possible sources of error in estimating 'run' include gyro error, log error, inaccurate estimate of the tidal stream or current, effect of wind, accuracy of helmsman.

Star sights are capable of accuracies of less than half a mile because refraction can be cancelled by stars observed nearly simultaneously on opposite bearings and the time between sights to be combined is usually short. However, accidents of weather may preclude the taking of star sights for several days, whereupon reliance must be placed on dead reckoning.

Respecting both sun and star sights, it is unlikely that a fishing-boat's captain will be anywhere near accurate. This is because movement of the small vessel, and spray, make use of a sextant difficult. Also, since celestial sights take twenty minutes it is unlikely that a fisherman will have the time to fix his position regularly.

(b) *Visual*. This is the simplest and commonest method when land is in sight. Its accuracy depends upon the accuracy of the chart, the knowledge of the compass error and correct identification of the land features. Greater accuracy can be obtained by observing pairs of simultaneous horizontal sextant angles—a standard method used by hydrographic surveyors and totally independent of compasses. An error of one degree displaces the line of bearing 400 yards at twelve miles. Provided the chart is accurate and identification correct, a position should be within one-quarter of a mile. Visibility is of course the limiting factor, since land elevated twenty feet above sea level tips below the horizon, to a height of eye of twenty feet, at a distance of 10.26 miles. Off low-lying coasts a fisherman may be out of sight of the elevation which constitutes a base point of a twelve-mile fishing zone.

(c) *Radar fixing*. Radar ranging is also virtually limited to line of sight but has greater ranges than visual sighting because the aerial can be high on a mast and intervening haze has no effect. It follows that if the coast-line has dipped below the visual horizon for the aerial height (11.48 miles for 100 feet and 16.2 miles for 200 feet) the echo received is probably higher land behind the coast (excepting cliff coastlines). It is then extremely difficult to be certain of target identification. Bearings obtained by radar depend for accuracy upon the beam width. To put a probable error on radar fixing is difficult because it varies so much with the target. With ideal conditions accuracies within one mile are to be expected even at forty or fifty miles' distance. The accuracy to be expected from a marine radar set of the type used in fishing-boats and naval patrol craft depends on a number of factors,<sup>1</sup> including the skill of the operator in strobing the

<sup>1</sup> The 1968 Board of Trade's *Marine Radar Performance Specification* lays down a range accuracy to within  $1\frac{1}{2}$  per cent of the maximum range scale in use, or 75 yards, whichever is the greater. If a variable range marker is used (Strobe) the accuracy required is within  $2\frac{1}{2}$  per cent of the range to the maximum range of the displayed scale in use, or 125 yards, whichever is the greater. The bearing accuracy required is within plus or minus  $1^\circ$ . The U.K. delegate at the 28th meeting of the Second Committee of the Geneva Conference referred to radar as not being



echo correctly. The compound of land height, radar indices, operator error, master gyro errors and repeater gyro misalignments,<sup>1</sup> is not likely to produce an observed position displaced from the true by less than half a mile in twelve. In the *Red Crusader* case<sup>2</sup> the Commission said:

The accuracy of ship-borne radar sets cannot yet be compared with the accuracy of the above-mentioned shore-based radar sets. For normal navigation purposes, such a great accuracy is not needed, but this implies that to all observations made on ship-borne sets a rather wide margin must be given. In order to determine the width of this margin, the specifications to which the radar sets have been made must be taken into consideration. It must be assumed that every set of a type-approved marine radar complies with the specifications under which it has been manufactured. It should never be less accurate; it can be much more accurate.

In the Performance Specification of the Marconi Marine Radio Locator IV carried in the *Red Crusader* an error not greater than plus or minus 5 per cent of the maximum range obtainable on the scale used was laid down. According to the records examined by the Commission an error of 2 per cent on the range scale of ten miles was verified, which corresponded with the opinion of all the experts concerned. The Commission 'thought it proper to conclude' that the radar plottings were accurate within a belt 0.4 mile wide. For the radar on board the *Neils Ebbesen* the Commission accepted a fixed correction of plus 0.35 mile and a plus or minus correction of 5 per cent of the maximum range on the scale in use, and stated that the bearing accuracy of the navigation radar sets on a moving ship should not be considered greater than two degrees.<sup>3</sup>

(d) *Electronic navigational aids.* There are many systems available but the ordinary vessel is likely to have only Decca Navigator, Loran or Omega. Decca, a pilotage-type radio aid, has a range of about 240 miles with accuracies which vary from ten yards to three miles depending on the ship's position in the 'pattern' and whether it is day or night.<sup>4</sup> Loran, an ocean-navigation-type radio aid, has ranges up to 300 miles with accuracies of between 0.6 per cent and 0.9 per cent of the range.<sup>5</sup> Omega, which is not yet in common use, will provide world-wide coverage with accuracies varying between within one mile and within three miles.<sup>6</sup>

Except where well-charted land is in sight or immediately after good star sights a vessel's position is unlikely to be known to better than one

completely reliable, especially in the case of small craft in bad weather: *United Nations Conference on the Law of the Sea*, vol. 4, 2nd Cmtee., p. 79, para. 3.

<sup>1</sup> Robb, *The Application of Radar to Seamanship and Marine Navigation* (2nd ed., 1953).

<sup>2</sup> *International Law Reports*, vol. 35, p. 485, at p. 489.

<sup>3</sup> See the comment on 'Radar and the Law' in the *South Texas Law Journal*, 10 (1968), p. 269.

<sup>4</sup> Powell in the *Journal of the Institute of Navigation*, 20 (1967), p. 237.

<sup>5</sup> Powell, *ibid.*, 19 (1966), p. 484.

<sup>6</sup> On electronics in fishing boats see Bennett, *ibid.*, p. 466.

mile. On a well-marked coast, with distinctive features on which to fix, the error might be as little as plus or minus half a mile, but on a low-lying, featureless coast it might be plus or minus two or three miles. Also, weather and visibility will affect the situation, so that the error will vary from day to day.

For an exercise of national jurisdiction to be valid in international law, or under the law of the national jurisdiction, an arresting authority must be able to establish in evidence that an offence was committed within the area of national jurisdiction. While it is true that legal responsibility rests on a fisherman not to violate the fishery legislation of a State, the fact is that most fishing vessels lack advanced navigational aids, and for this reason some flexibility in the administration of fishery laws is desirable. At least, fishery-protection officers should be instructed on the possible need to prove the accuracy of their gyro-compass, or that any error in it was known and corrected, and that the method of fixing eliminated doubt respecting the offender's position.

Because of the navigational difficulties which have been mentioned, Chile and Peru have agreed upon a mutual-tolerance zone of ten miles along the line of intersection of their respective 200-mile territorial sea. Most fishery-protection authorities would find such a tolerance zone inconvenient to police, considering the variable margins of error, yet a fixed tolerance zone of at least one mile in a twelve-mile fishery protection zone might eliminate some occasions of international controversy. In a 200-mile territorial sea the zone might be greater.

These considerations become even more important when a base-line technique for delineating the territorial sea is employed, since the base-points may often be low elevations lying off the coast, and the line joining them may be extended and outside the range of vision or of radar illumination of the coast. Then a ship's relationship to the outer line of the territorial sea will depend upon the accuracy of the more primitive methods of fixing a position which have been mentioned. These difficulties constitute important considerations in determining the extent of the territorial sea in international law.

## VI. CONCLUSIONS

It has become evident to naval legal staffs that many of the provisions of the Geneva Conventions, 1958, are unsatisfactory guides to international maritime behaviour, and that developments such as the dramatic territorial sea extensions effected by most of the Latin-American countries have both aggravated the international law problem of naval planning and breached the symmetry of the system contrived at Geneva. Countries

with extended territorial sea claims have been motivated by economic considerations, and their own naval forces have been dedicated to protecting economic goals. Navies of nations more preoccupied with seapower than with conservation of coastal resources perceive in these extended claims serious inhibitions on legitimate naval planning because of the problems they pose, some of which have been referred to above. And navies of nations which seek to manifest seapower, as well as to protect coastal resources, find planning frustrated by the contradictions which inherently divergent legal policies tend to produce. The fundamental problem is that international law has failed to disengage from the notion of the exercise of sovereignty, and hence from the concept of the territorial sea, interests which are legitimate in themselves yet rarely coincidental. The Latin-American States which claim a 200-mile territorial sea have a case for protecting economic resources which are of serious importance to them and are threatened by outside interests. The problems of defence posed to them by transit of submerged submarines through their 200-mile limits, and the restrictions imposed on other naval powers respecting the use of these waters, are, however, factors to be considered in analysing the impact of naval planning on the stability of the international community.

The doctrines of both lawyers and naval officers tend to be conservative, yet both must change under the impact of the changing political and technological environment if contradiction is to be avoided, such as is now apparent between Soviet political policy respecting exclusion of warships from the territorial sea, and Soviet naval policy respecting the deployment of submarine forces in foreign waters. The reconstruction of the law must be drastic if the legitimate economic interest of States in their coastal waters is to be recognized, without at the same time exacerbating the problems of security and international stability. The role that international law plays as a naval weapon has been too little recognized by either naval staffs or international lawyers, despite the classic instance of the destruction of the *Graf Spee* in 1939, when the lawyers completed an engagement begun at sea.<sup>1</sup> In circumstances of limited war this role is even more obvious and of greater potential significance, since every form of naval operation undertaken must be restrained by a set of rules, the observance of which is basic to the achievement of the political objective to which naval policy is subservient. The elaboration of these rules is an intellectual exercise of some difficulty, and it cannot be left to the political branch of government to undertake it without risk of confusing the task-force commander, because of the layman's ignorance of the tactical considerations which confront him. As time goes by and complexity intensifies, this

<sup>1</sup> A separate study of this is in preparation.



intellectual 'overlay' to naval planning will become increasingly important, and the international lawyer on naval staffs will increasingly be recognized as having a function commensurate with that of other departmental directors on the naval staff.

If the rules of limited warfare are to be satisfactorily related to the political objective they must be apprehended with clarity and stated with precision, so that the tactical commander will have maximum guidance concerning his courses of action, and be exposed to minimum doubt respecting his liberty of choices. At both the strategic and the tactical levels international law may govern the locality within which operations are to occur, and this in turn will determine many logistical considerations. The side which can most effectively utilize the law of war may have an advantage, if only because the maximum elimination of doubt from the mind of the tactical commander concerning the action to be taken by him may gain for him psychological ascendancy over his potential adversary. It must not be forgotten that the most advanced weapons which are available today are efficacious only when every factor, mechanical and human, is satisfactory, and that in time of tension and prolonged pressure the failure of one or both is likely. The tactical commander who is confident about his rules and does not require to ponder over them in an emergency is likely to have the advantage over one who is not; and the naval staff which employs every intellectual resource to lay down the rules is the more likely to achieve the political goal.

At the same time, the naval officer must be made more aware than he has been of the dangers involved in disregard of controverted questions of international law. A naval staff may plan to steam warships into the Aegean Sea without risk of a crisis because there is no dispute about the legal status of the waters in question. It would be rash to do so in the Black Sea without taking into account the legal arguments which might gain for the Soviet Union a measure of support in the United Nations in the event of an engagement. The political branches of Government often mislead naval staffs by directing them that certain claims to waters are rejected as contrary to international law. No claim is ever to be treated in a cavalier fashion, and if the claim is to be contested by an exercise of disputed rights this must be deliberately planned for and adequately supported with the necessary naval power.

The function of this paper has not been to research difficult issues of international law and state conclusions respecting them, but to identify a number of questions which international lawyers have only vaguely apprehended and to initiate discussions regarding them. The problem is not one of stating the law in the traditional sense, but of evaluating the role of law in naval situations. It is impossible, because of the variety of

these situations, to state the matter in the abstract. Naval officers and international lawyers must collaborate in the traditional service manner of elucidating problems, namely by syndicate discussion of tactical situations which are posed by a directing staff. When a sufficient number of these situations have been examined conviction may be gained respecting the legitimacy or otherwise of specific courses of action, or the controversy engendered may reveal the area of doubt. In either event, clarification is likely to yield more able draftsmanship of Rules of Engagement for limited war.

Although it would be premature in this paper to propose any conclusions, it is desirable to make some suggestions by way of crystallizing the issues that have been raised:

1. The drafting of naval Rules of Engagement presupposes a clear understanding of the Law of the Sea on the part of naval staffs, and it is desirable that all operational commanders and their staffs have sufficient understanding of it to minimize the risk of misinterpreting the expressions of international legal significance which are employed. To this end courses of instruction in relevant international law should be given in naval academies and senior officers' study courses (international law is a requirement of the United States Naval War College course), and there should be some specialization in the subject on the part of officers who will act as advisers to commanding officers, namely legal officers and supply officers.

2. The role of international law in sea power has not always been fully apprehended by naval staffs, and it should play a greater role in war games. There should be more evaluation of its rules by naval staffs, and there should be more interchange of ideas between naval staffs and professional international lawyers.

3. An hypothesis that might serve to minimize the threat to the peace which results from situations of limited hostilities would be that no belligerent acts are permitted on the high seas except in case of immediate and direct self-defence.

4. What constitutes proportional and necessary self-defence can only be gauged in the light of situational problems which are created by the factors of weapon capability, and evolving tactics.

5. In the case of submarine warfare, the rules in the London Protocol of 1936 are viable only in ideal circumstances which are unlikely ever to occur in practice. Self-defence is then the only criterion of submarine warfare, and it becomes a matter of technical evaluation to ascertain the factors of proportionality and necessity which legitimize submarine warfare in times of limited hostilities.

6. Operational zones in which A.S.W. will be conducted against all

submarine contacts may be a legitimate measure of self-defence, given the difficulties created for surface forces by modern submarine capabilities. Such a zone would differ from that created by Germany and condemned in the Doenitz trial, inasmuch as it would not affect 'neutral' rights of navigation, except in the peripheral instance of 'neutral' submarines. This corresponds with contemporary naval strategic thought. Within the limits of this paper it is not possible to analyse in detail the War Zones proclaimed in the two world wars and this must await another occasion. It is important to recall, however, the relevance of this topic to the further clarification of the questions which have been raised in this paper, and on which further discussion is necessary. Such a zone existed in Korea.

7. Evaluation of the 'innocence' of passage of a submarine submerged in the territorial sea can only proceed on the basis of the recognized procedures of submarine detection and tracking, and taking into consideration the extent of the territorial sea, navigational conditions and other factors. Before an attack is made on a submerged submarine, warning to surface should be given by recognized explosive signals. It is proposed that five underwater sound signals at two-second intervals become the internationally recognized signal. Attack would be legitimate upon failure to surface after such warning.

8. The rules relating to hospital ships require reconsideration in two respects:

(a) the use of cryptographic signal equipment;

(b) identification. In particular, the International Committee of the Red Cross should consider the promulgation of a sonar recognition signal to be used by hospital ships, so that attack on hospital ships by submerged submarines can be avoided.

9. Evaluation of the need for 'pre-emptive' action against a surface or air-missile-carrying craft can only proceed on the basis of situation studies, taking into account the factor of offensive and defensive weapon capability. Closer study of the technicalities of this question is necessary if the factors relevant to self-defence are to be isolated.

10. In times of limited war, any employment of missiles which could endanger international shipping is to be avoided as a violation of the freedom of the seas. Short-range missiles can be employed with minimal danger to 'neutral' ships because they can be guided from the launching vessel to the target. Long-range missiles, however, acquire a target by infra-red or radar homing methods, and upon entry into the target-acquisition-area are liable to home on the nearest ship which activates the missile's terminal homing system. The missile thus raises the old problem of unrestricted submarine warfare in a new form, and would seem to be a legitimate weapon only when:



- (a) pinpoint accuracy is available, which is the case only with short-range missiles; or
- (b) it is established that no neutral shipping is in the target acquisition area; or
- (c) the missile is controlled by aircraft or satellite to the target; or
- (d) the terminal homing system is refined to the point where it can infallibly distinguish between warships and merchant ships, by reference in particular to their respective heat emissions or radar echoing areas. This refinement has not yet been achieved.

11. Missile-armed surface warships may be required to exercise the right of innocent passage through straits and territorial waters with missiles housed, at least in times of political tension. Verification of this hypothesis must proceed on the lines of evaluating the aggravated threat to such a ship by virtue of the seconds required to move the missile from the rack to the launcher.

12. A.S.W. conducted by means of sonobuoy and dipping sonar searches is important in ensuring that convoys routed through narrow seas are not liable to submarine ambush. The question whether search procedures by ship-borne helicopters in international straits render passage non-innocent would seem to be foreclosed by the requirements of the Chicago Convention concerning transit of military aircraft over territorial waters.

13. Closer consideration is desirable of the need to avoid civilian damage by naval bombardment. Attention of naval staffs needs to be directed to the possibility of claims being made by 'neutral' governments for destruction of or damage to civilian property of their nationals. The principles of the Hague Convention need to be more explicitly inducted into operational orders, and, in particular, instruction on the need for evaluation of targets as military or civilian should be given to spotters, who ordinarily lack it.

14. The question is controversial whether there may be hot pursuit of a foreign fishing vessel found fishing in breach of the coastal State's laws in a fishing zone adjacent to the territorial sea. Even when hot pursuit is legitimate, great care must be exercised on the part of fishery-protection vessels about opening fire.

15. The navigational difficulties experienced by shipping in determining whether they are within the territorial sea of a foreign State are proportional to the extent of the territorial sea. Attention needs to be paid to the possibility of injustice in the rigid enforcement of fishery laws, and to the evidence which a court might require from a fishery-protection vessel of the position of the foreign fishing vessel if the matter is contested.

In particular, evidence is desirable that:

- (a) there has been a daily radar index error check (that is, a comparison of actual and radar range) and a repeated check, if possible, just prior to arrest;
- (b) there has been a weekly check for sextant error;
- (c) if an electronic fixing aid is employed, that reference was made at the time a fix was taken for purposes of arrest that errors were calculated according to specifications;
- (d) the gyro has been checked at sunrise and sunset and again at the time of arrest by taking a transit when one piece of land passes another.

Finally, a definition of limited war will prove helpful in clarifying the concepts of law to be utilized. It is proposed that the expression 'limited war' cover the situation of hostilities, not amounting to declared war, which are limited in respect of

- (a) the area of operations;
- (b) the weapons employed; and
- (c) the targets engaged.

We have now sufficient experience of limited wars in this sense for international lawyers to be able to propose new rules for what is a new phenomenon.





# RECENT CASES ON PRE-TRIAL DETENTION AND DELAY IN CRIMINAL PROCEEDINGS IN THE EUROPEAN COURT OF HUMAN RIGHTS\*

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## INTRODUCTION

IN practice, the parts of the European Convention on Human Rights most commonly invoked in applications made to the Strasbourg authorities have been those in Articles 5 and 6 on the administration of criminal justice. Inevitably problems have arisen in their interpretation. Provisional answers to many of these can be found in the jurisprudence of the European Commission of Human Rights. They are provisional for the reason that the final word on the meaning of the Convention lies with the European Court of Human Rights. This being so, it is of interest that in the *Wemhoff*, *Neumeister*, *Stögmüller* and *Matznetter*<sup>1</sup> cases the Court has recently delivered its first judgments on the administration of criminal justice. Not surprisingly, they are concerned with questions of pre-trial detention and of delay in criminal proceedings, these being the subjects that have generally caused the most difficulty.<sup>2</sup> The four judgments will be analysed in the present article with the object of showing how the Court has interpreted the provisions of the Convention in issue before it and of throwing some light upon the practical value of the guarantee provided therein. First the facts of the four cases will be given in summary form; then the grounds for detention pending trial, the conditions that may be attached to release pending trial, and the question of what constitutes a 'reasonable time' in bringing any person to trial (whether detained pending trial or not) will be considered in that order.

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<sup>1</sup> *Wemhoff* case, *European Court of Human Rights* (referred to hereinafter as *E.C.H.R.*), Judgment of 27 June 1968; *Neumeister* case, *E.C.H.R.*, Judgment of 27 June 1968; *Stögmüller* case, *E.C.H.R.*, Judgment of 10 November 1969; *Matznetter* case, *E.C.H.R.*, Judgment of 10 November 1969. These cases are hereinafter referred to as *Wemhoff* case, *Neumeister* case, *Stögmüller* case and *Matznetter* case and page numbers given are those of the respective judgments cited in full in this note.

<sup>2</sup> A fifth judgment—in the *Delcourt* case—has since been delivered on the separate question of 'equality of arms' under Article 6: *E.C.H.R.*, Judgment of 17 January 1970. In July 1970 the European Commission of Human Rights decided to refer to the Court a further case—the *Ringeisen* case—on pre-trial detention and delay in criminal proceedings (resulting from application No. 2614/65 lodged against Austria); the decision as to the admissibility of this case is printed in *Collection of Decisions of the European Commission of Human Rights*, 27 (1968), p. 29.

In order that the implications of the four cases may be fully appreciated, and for convenience of reference, it seems desirable to conclude the present Introduction by setting out the text of Articles 5 and 6 (1) of the Convention:

### *Article 5*

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligations prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

### *Article 6*

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.

## THE FACTS OF THE FOUR CASES

In the *Wemhoff* case the applicant, a West German national, was arrested on 9 November 1961 on suspicion of complicity in 'offences of breach of trust'.<sup>1</sup> On the same day, an investigation of the case was begun by the Public Prosecutor's Office in West Berlin in accordance with the civil law system of criminal procedure in West Germany.<sup>2</sup> On the following day, the applicant was remanded in custody. The investigation was completed on 24 February 1964. An indictment was filed on 23 April 1964 and on 17 July 1964 the applicant was committed for trial. The trial began before the Regional Court of Berlin on 9 November 1964 and the applicant was convicted on 7 April 1965 of a 'particularly serious case of prolonged abetment to breach of trust'<sup>3</sup> for which he was sentenced to six and a half years' penal servitude. The period of time spent in detention on remand was counted as part of this sentence. The applicant's appeal against conviction was rejected on 17 December 1965. The case therefore took four years and one month from the time of the applicant's arrest to the final judicial ruling, during the whole of which time the applicant remained in custody. In this connection it should be mentioned that the case was an extremely complicated one. It involved twelve other accused persons in addition to the applicant, of whom seven were eventually tried with him. The allegations were of large-scale misappropriations of bank funds and required the examination of a considerable number of bank accounts and transactions. 'By the time the charge was preferred the court's records comprised 45 volumes containing some 10,000 pages.'<sup>4</sup>

Initially the grounds for detaining the applicant pending trial were twofold: the danger of flight, because of the heavy sentence he could expect if convicted, and the danger of suppression of evidence. In 1963 the second ground was dropped. Detention continued on the basis of the first, which had become stronger since the likely sentence to be expected in the case of conviction had increased and because medical evidence of the applicant's character had been produced supporting the view that he would abscond if released. The applicant asked for his release on three occasions. In May 1962 he made an offer of an unspecified amount of bail which was rejected because at that time it was believed that the dangers of suppression of evidence and of flight prevented bail at any price. A second offer of bail of 200,000 DM made in August 1962 was withdrawn, apparently before the court could consider it. A third offer of 100,000 DM was made after the trial and the applicant's conviction and before the

<sup>1</sup> *Wemhoff* case, p. 6.

<sup>2</sup> On the difference at this stage between civil and common law systems of criminal procedure, see below, p. 100.

<sup>3</sup> *Wemhoff* case, p. 11.

<sup>4</sup> *Ibid.*, p. 10.



appeal was heard. This was accepted by the Court but was then withdrawn by the applicant who offered instead a much lower sum which the Court decided was inadequate in view of the danger of flight.

The applicant lodged his application with the European Commission on 9 January 1964, at which point he had been detained for two years and two months. His application was admitted for consideration on its merits in respect of possible violations of Articles 5 (3) and 6 (1) of the Convention.<sup>1</sup> After investigating the case and failing to achieve a friendly settlement between the parties, the Commission adopted its report on 1 April 1966. In this it expressed its opinion, by 7 votes to 3, that 'the applicant had not been brought to trial "within a reasonable time" or released pending trial and that, consequently Article 5 (3) of the Convention had been violated,<sup>2</sup> and, unanimously, that no violation of Article 6 (1) had occurred. The Commission then referred the case to the European Court for a final decision. In June 1968 the Court<sup>3</sup> decided, by a majority of 6 votes to 1,<sup>4</sup> that no violation of Article 5 (3) had occurred and, unanimously, that there had been no violation of Article 6 (1) either.

The facts of the other three cases, which were all against Austria, were very much of a kind with those in the *Wemhoff* case. In all of them the applicants were charged with serious offences involving complicated financial dealings. In all of them they complained of violations of Article 5 (3) in that they had not been tried within a reasonable time or released pending trial. The Austrian system of criminal procedure is, like the West German one, a civil law system and the applicants spent periods ranging from two years in the *Stögmüller* case to two years two months in the *Neumeister* case in detention pending trial. Danger of flight was given as a ground for detention in all three cases. In the *Stögmüller* and *Matznetter* cases prevention of crime was relied on also. In the *Neumeister* case, as in the *Wemhoff* case, a violation of the 'trial within a reasonable time' guarantee in Article 6 (1) was also argued. Seven years and four months elapsed between the time that the applicant in the *Neumeister* case was charged in Austria and the time the European Court gave judgment in his case at Strasbourg, at which point of time no decision had been rendered by the trial court in Austria.<sup>5</sup> In the *Neumeister* and *Stögmüller* cases the Court<sup>6</sup> unanimously decided that a violation of Article 5 (3)

<sup>1</sup> For the text of these provisions see above, p. 88.

<sup>2</sup> *Wemhoff* case, p. 13.

<sup>3</sup> In all four cases, in accordance with Article 43 of the Convention, the Court consisted of a chamber of seven judges. In the *Wemhoff* case the chamber was composed as follows: Rolin (President); Rodenbourg, Wold, Mosler, Zekia, Favre, Bilge (Judges).

<sup>4</sup> Judge Zekia dissented.

<sup>5</sup> For further details see below, pp. 98-9.

<sup>6</sup> In the *Neumeister* case the Court was composed as follows: Rolin (President); Holmbäck, Ballardore Pallieri, Mosler, Zekia, Bilge (Judges); Schima (Judge *ad hoc*). In the *Stögmüller* case it was composed as follows: Rolin (President); Holmbäck, Verdross, Ballardore Pallieri, Zekia, Cremona, Bilge (Judges).

had occurred. In the *Neumeister* case the Court for the first time ruled that a State was in default of its obligations under the Convention. In that case Austria was found (1) at one stage to have refused to countenance the possibility of release when, in the opinion of the Court, the danger of the defendant's absconding did not warrant this, and (2) when later it agreed that the defendant could be released, to have calculated on the wrong basis the amount to be deposited by way of security. In the *Stögmüller* case Austria was found to have continued to detain the defendant on grounds of appearance at trial and prevention of crime when this, in the opinion of the Court, was no longer justifiable on the facts of the case. In the *Matznetter* case<sup>1</sup> the Court decided, by 5 votes to 2,<sup>2</sup> that no violation of Article 5 (3) had occurred. Further, in the *Neumeister* case it decided by 5 votes to 2<sup>3</sup> that no violation of Article 6 (1) had occurred.

#### CONTROL OF THE GROUNDS FOR PRE-TRIAL DETENTION

One of the most significant rulings in the four cases is that under Article 5 (3) of the Convention the Court is competent to review the grounds upon which a person who has been arrested under Article 5 (1) (c) 'on reasonable suspicion of having committed an offence'<sup>4</sup> continues thereafter to be detained pending trial. The Court discovered this competence in that part of Article 5 (3) which provides that a person arrested under Article 5 (1) (c) 'is entitled to trial within a reasonable time or to release pending trial'. On the face of it this wording obliges a State to try a detained accused within a reasonable time or, if it does not or cannot do so, to release him. The Court, however, rejected this reading, which it called the 'purely grammatical interpretation'. In the first of its four judgments, in the *Wemhoff* case, the Court explained that the 'purely grammatical interpretation' would allow a State to avoid trying a person within a reasonable time at the cost of releasing him. This, the Court felt, could not have been the intention of the contracting parties; it would, moreover, be 'flatly contrary'<sup>5</sup> to the guarantee of 'trial within a reasonable time' in Article 6 (1).

How then was Article 5 (3) to be understood? The Court noted first that Article 5 (3) is part of a guarantee of freedom of the person. It then continued:

It is thus mainly in the light of the fact of the detention of the person being prosecuted that national courts, possibly followed by the European Court, must determine whether the time that has elapsed, for whatever reason, before judgment is passed on the accused has at some stage exceeded a reasonable limit, that is to say imposed a

<sup>1</sup> In the *Matznetter* case the Court consisted of the same judges as in the *Stögmüller* case.

<sup>2</sup> Judges Zekia and Cremona dissented.

<sup>3</sup> Judges Zekia and Holmbäck dissented.

<sup>4</sup> The full text of Article 5 (1) (c) is printed above, p. 88.

<sup>5</sup> *Wemhoff* case, p. 22.



greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed to be innocent.

In other words it is the provisional detention of accused persons which must not, according to Article 5 (3), be prolonged beyond a reasonable time.<sup>1</sup>

And when is the detention of the accused 'prolonged beyond a reasonable time'? The answer given by the Court is twofold: (1) when (and to the extent that) the investigation and trial are conducted less expeditiously than is possible consistently with the proper administration of justice;<sup>2</sup> (2) when, alternatively, there is no good reason in the public interest (e.g. that the accused might escape) to continue it any further pending trial.<sup>3</sup>

So far as it concerns the time within which a detained accused is brought to trial, the Court's interpretation leads, generally, to the same result as the 'purely grammatical interpretation'. So far as it provides a means of controlling the grounds upon which a State continues to detain an accused, it goes far beyond 'the purely grammatical interpretation' and adds an extra dimension to both Article 5 (3) and Article 5 as a whole. This last statement can be supported by reference to the scope of Article 5 (1) (c) which is the only other part of the Convention which imposes control over a State's discretion in detaining an accused. The first of the three limbs of Article 5 (1) (c)<sup>4</sup> permits arrest or detention where a person is reasonably suspected of having committed a criminal offence. It would seem to permit further detention after the initial act of arrest or detention provided that a 'reasonable suspicion' remains. It would *not* seem to offer any basis for challenging continued detention where that condition is met. This much was accepted by the Court in the *Stögmüller* case in

<sup>1</sup> *Wemhoff* case, p. 22. Cf. *Neumeister* case, p. 37, and *Stögmüller* case, p. 40.

<sup>2</sup> *Wemhoff* case, p. 26. Cf. the *Stögmüller* case, p. 44, and the *Matznetter* case, pp. 34-5.

<sup>3</sup> *Wemhoff* case, pp. 24-5. Cf. *Neumeister* case, p. 37, and *Stögmüller* case, pp. 40-3. Surprisingly, in the *Wemhoff* case, p. 22, the Court states that its interpretation of Article 5 (3) was shared by the Commission. The Commission's substantial jurisprudence on this point shows no clear evidence of this; in it the Commission would seem rather to have been concerned solely with the reasonableness of the *length* of pre-trial detention. The decision to continue to detain is to be judged by reference to the reasons and facts relied on by the State and the applicant in the course of the exhaustion of local remedies: *Wemhoff* case, p. 24, and *Neumeister* case, p. 37. The approach taken on this point by the Court overrules that taken by the Commission. The Commission had identified seven factors as being relevant in determining whether the time taken in bringing a detained person to trial was reasonable and had referred to all of them in assessing the facts of every case coming before it whether they had been relied on locally or not: see, e.g., *Wemhoff* case, pp. 14 et seq. One merit of the Commission's approach concerns the delicate question of the relationship between Strasbourg authorities and local courts. The Commission has consistently stated that it is not a court of appeal from local courts. This can be a difficult but necessary position to maintain in some questions concerning the administration of justice and it might be argued that the Commission's more abstract approach comes closer to maintaining it than the Court's in the present context. Note that the Court's approach confirms the essentially provisional nature of the Commission's jurisprudence. The Commission now follows the Court's ruling on this point: Application 3376/67, decision on admissibility, *Collection of Decisions of the European Commission of Human Rights*, 29 (1969), p. 31.

<sup>4</sup> For the text of Article 5 (1) (c), see above, p. 88.



1969. There Austria put the argument that the Court in finding a means of reviewing the grounds for detention in Article 5 (3) in the *Wemhoff* and *Neumeister* cases the previous year had ignored a clear division of function between Article 5 (1) (c), which was concerned with the *grounds* for detention, and Article 5 (3), which was concerned with the *length* of detention. In rejecting this argument the Court accepted that under Article 5 (1) (c) continuing detention was beyond challenge provided a 'reasonable suspicion' remained.<sup>1</sup> It then continued: 'Article 5 (3), clearly implies, however, that the persistence of suspicion does not suffice to justify, after a certain lapse of time, the prolongation of the detention.'<sup>2</sup> In other words, some other reason based upon the public interest needs to be found to satisfy Article 5 (3).

Without doubt, the Court here chose to interpret Article 5 (3)—a somewhat curiously worded provision—in a manner that is fully in keeping with the general purpose of the Convention of protecting human rights.<sup>3</sup> It found in that provision a guarantee for the accused that he be released where the public interest does not require his continued detention, one without which the Convention would surely be defective in its protection of the freedom of the individual. The Court's sympathetic approach is particularly striking since the case for the 'purely grammatical interpretation' is by no means a weak one. Whereas the Court saw that interpretation as giving an advantage to the prosecuting State that could not have been intended by the contracting parties, on another view it imposes, if anything, too great a burden upon that State since it would seem to require that if a person cannot be, or is not, tried within a reasonable time he must be released *in every case*—a rather arbitrary requirement. It would seem to call for release, in particular, regardless of the danger of the accused's not appearing for trial or suppressing evidence.<sup>4</sup> As to the argument that the 'purely grammatical interpretation' is 'flatly contrary' to Article 6 (1), the latter would still be available to a person released under Article 5 (3). On the 'purely grammatical interpretation', in fact, the two provisions would operate quite consistently with each other. Moreover, it could not be said that the requirement of trial within a reasonable time for detained persons under Article 5 (3) was redundant because of

<sup>1</sup> *Stögmüller* case, p. 40. But see the opinions of Judges Balladore Pallieri and Zekia in *Matznetter* case and the discussion of them below, pp. 95–6.

<sup>2</sup> *Stögmüller* case, p. 40.

<sup>3</sup> Note that the Council of Europe, the parent body of the Convention, through its Committee of Ministers, recommended in 1965 that 'remand in custody should be ordered or continued only when it is strictly necessary'; Resolution (65) 11.

<sup>4</sup> In the preparatory work of the Convention, the only statement going directly to this point would appear to be that of Mrs. Roosevelt in the United Nations Commission on Human Rights in which the speaker quite clearly saw the wording now in Article 5 (3) of the European Convention as having the effect referred to above, apparently in an unqualified sense: U.N. Doc. E/CN. 4/SR 101, p. 7.

the existence of the same requirement for all persons in Article 6 (1). Apart from the value it would have as a sanction for the State that wants to keep an accused detained, the Court has established that so far as it relates to the time taken to bring a detained person to trial, the 'reasonable time' requirement in Article 5 (3) is a stricter one than that in Article 6 (1).<sup>1</sup> Finally, the Court's rejection of the 'division of function' argument of Austria on the relationship between Article 5 (1) (c) and Article 5 (3) is, to say the least, not beyond question when the text seems clearly to have been drafted with the intention of assembling all of the grounds for detention in Article 5 (1).

#### PERMISSIBLE GROUNDS FOR PRE-TRIAL DETENTION

Having established that it can review the grounds upon which an accused who has been arrested continues to be detained, the Court then considered whether the continued detention in the cases before it was permissible. The Court's consideration of this question, in terms of the grounds which it found to be acceptable, will be discussed here. Its treatment of the other basis for finding that detention of an accused has become unreasonable—namely that a case has not been conducted with sufficient expedition—will be discussed later.

1. *Danger of flight*. The Court accepted that this could be a good reason for continuing to detain an accused. The fullest statement of the general test the Court applied in determining whether there was good reason for detention on this basis is found in the *Stögmüller* case where it said: 'There must be a whole set of circumstances . . . which give reason to suppose that the consequence and hazards of flight will seem to him [the accused] to be a lesser evil than continued imprisonment.'<sup>2</sup> The four judgments indicate most, if not all, of the 'circumstances' that are relevant. Particularly important is the severity of the sentence the accused can expect if convicted.<sup>3</sup> In so far as this consists of imprisonment, its significance alters as the length of the period of his pre-trial detention increases in cases in which it can be assumed as a matter of law or of fact that that period will be taken into account in fixing or applying the sentence.<sup>4</sup> In the *Neumeister* case the Court also took into account the probable *civil* liability that would fall upon the accused under Austrian law in respect

<sup>1</sup> See below, p. 101.

<sup>2</sup> *Stögmüller* case, p. 44. See also *Wemhoff* case, p. 25; *Neumeister* case, p. 39; and *Matznetter* case, p. 35.

<sup>3</sup> *Wemhoff* case, p. 25; *Neumeister* case, p. 39; *Stögmüller* case, p. 44; and *Matznetter* case, p. 36.

<sup>4</sup> *Wemhoff* case, p. 25; *Neumeister* case, p. 39; and *Matznetter* case, p. 34. This has particular importance in civil law systems in which, as noted, an accused may spend a very long period in detention; see above, pp. 89–90.

of the loss of property that would be attributed to him if convicted.<sup>1</sup> In the same case, the Court stated that 'other factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted'<sup>1</sup> are relevant. So also are 'the accused's particular distaste for detention'<sup>2</sup> and indications that he has links with another country that will enable him to escape or that he is actually planning to escape.<sup>3</sup> Opportunity for escape may also to some extent be taken into account.<sup>2</sup> In the *Wemhoff* case the Court held that it followed from the final sentence of Article 5 (3)<sup>4</sup> that where the danger of the accused's not appearing for trial was the sole justification for detention 'his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance'.<sup>5</sup>

2. *Suppression of evidence.* In the *Wemhoff* case the Court accepted that fear of suppression of evidence was a permissible ground of detention under the Convention.<sup>5</sup>

3. *Prevention of crime.* In the *Matznetter* case, the Court, by 4 votes to 3, was 'prepared to hold . . . [detention on the basis of prevention of crime] . . . to be compatible with Article 5, paragraph (3), of the Convention in the special circumstance of the case'.<sup>6</sup> It did not expressly identify the 'special circumstances' it had in mind but its discussion of the facts suggests that it was referring to the existence of a general danger that the accused if released would commit an offence or offences of the serious kind with which he was already charged. In that case the applicant was charged with offences of aggravated fraud, fraudulent bankruptcy and simple bankruptcy under Austrian law involving a loss to the victims of some eighty to one hundred millions Austrian schillings. The offences were serious in their legal classification and their effect. The danger that the accused would commit an offence or offences of the same kind was thought to exist because of the applicant's 'very prolonged continuance of reprehensible acts'; from his 'wickedness'; and from the fact that his 'experience and great skill . . . were such as to make it easy for him to resume his unlawful activities'.<sup>7</sup> There was no reference to a belief that any particular offence would be committed. Of the three judges in the minority, Judge Balladore Pallieri thought that prevention of crime *could* be a basis for the detention of an accused but only where there was reason to believe at the time that the decision to detain or to continue to detain was taken he would commit a particular, identifiable

<sup>1</sup> *Neumeister* case, p. 39.

<sup>2</sup> *Stögmüller* case, p. 44.

<sup>3</sup> *Neumeister* case, p. 39, and *Matznetter* case, p. 35.

<sup>4</sup> For the text, see above, p. 88.

<sup>5</sup> *Wemhoff* case, p. 25.

<sup>6</sup> *Matznetter* case, p. 33. See also *Stögmüller* case, p. 43.

<sup>7</sup> *Matznetter* case, p. 33.



offence.<sup>1</sup> Judge Zekia would have drawn the net even tighter so that, with certain exceptions, detention would only be authorized where 'what he [the accused] does by the time of his arrest amounts to a punishable offence in the country in which he lives'.<sup>2</sup> For Judge Cremona, detention for the prevention of crime was permissible even though the danger related to no particular offence provided that there was, as the Court would seem to have required also, 'reasonably . . . some relationship between the offence charged and the new offence or offences apprehended'<sup>3</sup> and if, in addition, there was a 'real likelihood'<sup>4</sup> of a similar offence's being committed. Generally, 'the justificatory force of this ground of detention is less both in intensity and extent than that of the danger of absconding'.<sup>4</sup> On the facts, Judge Cremona found that there was no 'real likelihood' of a similar offence's being committed.

The Court's acceptance of the above three grounds as permissible would seem both to conform with normal practice and to strike a reasonable balance between the right to freedom of the person and the need to ensure the effective administration of justice. As far as the ground of the prevention of crime is concerned, it is interesting to relate the Court's ruling in the *Matznetter* case to its earlier ruling on preventive detention in the *Lawless* case.<sup>5</sup> There the Court rejected Eire's claim that it could rely upon the 'prevention of crime' limb of Article 5 (1) (c)<sup>6</sup> to justify the administrative detention of the applicant when it had no intention of charging him with any criminal offence or bringing him before a Court to have the legality of his detention judicially reviewed.<sup>7</sup> The Court did so on the ground that a person arrested or detained under Article 5 (1) (c) for the prevention of crime has, like a person arrested or detained under the other two limbs of the same provision, to be arrested or detained 'for the purpose of bringing him before the competent legal authority' with a view to a judicial determination of the legality of his detention or to trial for an offence in due course. This followed from a 'grammatical analysis' of the Convention and from the purpose of Article 5. As to the latter, the Court commented:

. . . if the construction placed by the Court on . . . [Article 5 (1) (c) and (3)] . . . were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention. . . .<sup>8</sup>

<sup>1</sup> *Matznetter* case, p. 40. Note that Judge Balladore Pallieri agreed with the Court's decision that no violation of Article 5 (3) had occurred but wrote a concurring opinion disagreeing on this one point.

<sup>2</sup> *Ibid.*, p. 43.

<sup>3</sup> *Ibid.*, p. 48.

<sup>4</sup> *Ibid.*, p. 49.

<sup>5</sup> *Lawless* case, *E.C.H.R.*, Judgment of 1 July 1961.

<sup>6</sup> For the text, see above, p. 88.

<sup>7</sup> The applicant was associated with the I.R.A. and he was detained to keep him out of the way in the interest of national security at a time when the I.R.A. was causing a lot of trouble.

<sup>8</sup> *Lawless* case, p. 52.

There is no logical inconsistency between the *Matznetter* case, which was based upon the first limb of Article 5 (1) (c) coupled with Article 5 (3),<sup>1</sup> and the *Lawless* case, which was based upon the second, or prevention of crime, limb of Article 5 (1) (c). The Court, having previously condemned an undoubtedly objectionable kind of preventive detention in the *Lawless* case, in the *Matznetter* case approved, by a narrow majority, a less questionable form of it. As indicated, this result would appear to be an acceptable one in terms of the purpose of the Convention. Although in the *Matznetter* case the Court has settled for a less than absolute adoption of an important principle prohibiting preventive detention, a convincing argument by reference to social interests can be made out for an exception to it in cases in which there is good reason for a judge to believe that a person suspected of one serious offence will commit another—even if unidentifiable at the time—if released pending trial.

#### CONDITIONAL RELEASE PENDING TRIAL

Article 5 (3) states that if an accused is released pending trial his release 'may be conditioned by guarantees to appear for trial'. Using the maxim *expressio unius est exclusio alterius*, which has been applied in the construction of treaties,<sup>2</sup> Article 5 (3) can be read as meaning that the only conditions that can be attached to release pending trial are ones relating to appearance at trial; conditions regarding the suppression of evidence or the prevention of crime, for example, cannot be imposed. In the *Neumeister* case Austria was held to have violated Article 5 (3) partly because the amount of bail set had been calculated 'solely in relation to the loss imputed to' the applicant. This, the Court held, was contrary to Article 5 (3) because 'the guarantee provided for by that Article is designed to ensure not the reparation of loss but rather the presence of the accused at the hearing'.<sup>3</sup> This is not inconsistent with the above interpretation of the bare text and could be read as supporting it.<sup>4</sup> If this is the Court's interpretation of Article 5 (3), the Court can be criticized as having adopted a view which, although seemingly favouring the individual, can work to his disadvantage in that it may prevent his release altogether if a condition as to appearance is all that can be set in cases in which there are good grounds (e.g. the suppression of evidence or the prevention of

<sup>1</sup> But see the opinions of Judges Balladore Pallieri and Zekia in the *Matznetter* case who relied upon the 'prevention of crime' limb of Article 5 (1) (c): see the text above, p. 88.

<sup>2</sup> See, e.g., *The Life Insurance claims (U.S. v. Germany) (1924)*, 7 *R.I.A.A.*, vol. 7, pp. 91, 111.

<sup>3</sup> *Neumeister* case, p. 40.

<sup>4</sup> On this interpretation the use of the word 'solely' by the Court in the passage just quoted would be related to the need to take considerations such as the ability of the accused to pay a monetary condition attached to release and the temptation for him to abscond into account and not as hinting that conditions other than ones relating to appearance are permitted.

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crime) for refusing release without the attachment of conditions relating to such grounds.

In the *Wemhoff* case, the Court confirmed that financial conditions to ensure appearance at trial are permitted.<sup>1</sup> In the *Stögmüller* case it implied that the surrender of a passport for the same purpose may also be required.<sup>2</sup> Where the guarantee is a monetary one, the amount set must be assessed 'principally by reference to him [the accused], his assets and his relationship with the persons who are to provide the security', the purpose being to ensure that there will be 'a sufficient deterrent to dispel any wish on his part to abscond'.<sup>3</sup> Although the Court did not have occasion to say so, it would seem likely that the setting of an amount that is more than sufficient to achieve this would be a violation of the Convention. The Court accepted that the danger of the accused's absconding could be such as to make any sum insufficient.<sup>3</sup> This might be the case, for example, where the accused can expect a death penalty if convicted. Such rules would not seem to interfere unduly with the freedom of the individual.

#### DELAY IN CRIMINAL PROCEEDINGS

Whereas the Court went out of its way to strengthen the control imposed by the Convention over the grounds for the continued detention of an accused, the same could scarcely be said of its rulings on the time that can lawfully be taken in disposing of a criminal case. As indicated, the requirement in Article 5 (3) that a detained accused be tried 'within a reasonable time' or released pending trial has been interpreted by the Court as meaning in part that criminal proceedings must be conducted expeditiously. It is this aspect of that provision that will be considered here. The 'reasonable time' guarantee in Article 6 (1), applying to all accused persons whether detained pending trial or not, will, however, be discussed first.<sup>4</sup>

The Court's understanding of the 'reasonable time' guarantee in Article 6 is best seen in the *Neumeister* case. The applicant was charged on 23 February 1961. The investigation into his case by the Austrian investigating judge was completed on 4 November 1963. The trial began one year later, on 9 November 1964. It was adjourned on 18 June 1965 so that further evidence could be obtained by the prosecution

<sup>1</sup> *Wemhoff* case, p. 25; see also *Neumeister* case, p. 40. Note that whereas such conditions are normal in many countries, they are frowned upon in others (e.g. Denmark and Sweden) because they favour the rich.

<sup>2</sup> *Stögmüller* case, p. 44.

<sup>3</sup> *Neumeister* case, p. 40.

<sup>4</sup> The comparable provision in the U.N. Covenant on Civil and Political Rights (Article 14) lacks such a guarantee in respect of *civic* criterion. Differences such as this make the relationship between the European Convention on Human Rights and the European Social Charter on the one hand, and the U.N. Covenants on the other, and the remedies available under them, a pertinent question in the event of the U.N. Covenants' coming into force.



and was reopened on 4 December 1967. When the European Court delivered judgment on 27 June 1968, more than seven years after the applicant had been charged, the trial court still had the case under consideration.<sup>1</sup> The European Court first noted that the time that had elapsed was 'an exceptionally long period which in most cases should be considered as exceeding the reasonable time laid down in Article 6 (1)'.<sup>2</sup> It then commented upon aspects of the investigation of the case by the investigating judge and found cause for 'serious disquiet'.<sup>3</sup> It later characterized the one-year delay in opening the case after the investigation had been completed as 'indeed disappointing'<sup>3</sup> and the need to adjourn it for two and a half years for further investigation as 'even more disappointing'.<sup>3</sup> None the less, the Court decided, by 5 votes to 2, that there had been no breach of the Convention. It did so because the 'extreme complexity' of the case—with, in particular, the need to reconstruct complicated business dealings and to obtain much evidence (including some sought during the adjournment) from abroad by very time-consuming procedures—was such as to justify the time taken in preparing it and because the steps that it had been suggested the Austrian authorities could have taken to speed the investigation either would not have done so or had not been shown to the satisfaction of the Court to be compatible with the good administration of justice.

The case shows that the crucial consideration under Article 6 (1) is not time itself, but time in relation to the investigation and trial of a case in a manner consistent with the good administration of justice. It is significant that the only common law judge sitting in the case—Judge Zekia from Cyprus—was one of the two judges<sup>4</sup> to dissent from the Court's ruling. In his opinion it was impossible to accept that a delay of over seven years could be compatible with the letter and spirit of the Convention. Support for that opinion can surely be found in the statement by the Court in the *Wemhoff* case on the purpose of the guarantee in Article 6 (1) which was identified as being 'to ensure that accused persons do not have to be under a charge for too long and that the charge is determined'.<sup>5</sup>

This last statement leads directly to an extremely significant aspect of the *Neumeister* case. To the extent that the delay arose in the course of the investigation of the case, the facts were such as to confront the Court with an important difference between the common law system of criminal

<sup>1</sup> The applicant, who had been detained over two years pending trial, had been released by this time.

<sup>2</sup> *Neumeister* case, p. 41.

<sup>3</sup> *Ibid.*, p. 42.

<sup>4</sup> Judge Holmbäck from Sweden was the other. See also Judge Zekia's dissenting opinion in the *Wemhoff* case, pp. 35 et seq.: Judge Zekia was the one judge to dissent from the decision of the Court that the detention of the applicant for nearly three and a half years until the decision of the trial court was not contrary to Article 5 (3).

<sup>5</sup> *Wemhoff* case, p. 26.

procedure of the sort found—for example—in England, and the civil law systems used by some continental States parties to the Convention.<sup>1</sup> Whatever the relative position in other respects, it would appear that a person accused of an offence under English law, in which the investigation into the offence is conducted by the police largely before a charge is brought, is likely to spend less time waiting for his trial than a person charged with the same offence under some civil law systems, in which the investigation is to a larger extent conducted by an investigating judge after the charge is brought. Certainly, if we take the facts of the *Neumeister* case, or those of the other three cases before the Court, it is difficult to imagine, however complicated the facts may have been, that the proceedings would have lasted anything like as long in the English courts as they actually did in the civil law systems concerned. A question that could be asked in these circumstances is, therefore, whether civil law methods of investigating criminal cases which result inevitably in complicated cases in long delays after a person has been accused are in themselves compatible with the Convention. It is of the utmost importance for the future application of Article 6, as well as of other provisions of the Convention in other areas, that the Court made it clear that they are. In the words of the Court, ‘... a concern for speed cannot dispense those judges who in the system of criminal proceedings in force on the continent of Europe are responsible for the investigation or the conduct of the trial from taking every measure likely to throw light on the truth or falsehood of the charges’.<sup>2</sup> Article 6 (1), it would seem, is limited to guaranteeing that any such system operates efficiently.

The Court’s approach can be supported by reference to the intention of the parties to the Convention when it was drafted; it must be assumed that the States that took part in the drafting did not intend to require such a fundamental change in the law of the great majority of them as would be required by an interpretation different from that adopted by the Court.<sup>3</sup> At the same time, the outcome is unsatisfactory in that if the guarantee in Article 6 (1) means that criminal proceedings must be efficiently conducted according to the standards of the system used in a given country, the time taken in bringing a man to trial in a common law system might violate the Convention if there has been unnecessary delay at any stage according to the standards of that system, when a much

<sup>1</sup> For a summary of the systems in some countries that are parties to the European Convention, see *German Code of Criminal Procedure* (American Series of Foreign Penal Codes, 1965), pp. 1–23, and Botein and Sturz, ‘Report on Pre-Trial Release Practices in Sweden, Denmark, England and Italy . . .’, *Journal of the International Commission of Jurists*, 5 (1964), p. 203. See also *French Code of Criminal Procedure* (in the Series just cited, 1960), pp. 1–3.

<sup>2</sup> *Neumeister* case, pp. 42–3.

<sup>3</sup> Cf. the approach of the Court in looking for the intention of the parties on another point in the *Wemhoff* case, p. 23.

longer time taken in a civil law system might not. The result is both the absence of a common European standard as to the time an accused may be kept waiting for a decision in his case and the possibility that in some legal systems an accused may have to wait for what might well be thought to be an undue period of time before his case is decided, without a violation of the Convention occurring.

Turning to Article 5 (3), it is probably correct to suppose that the considerations in this section concerning Article 6 (1) apply to the 'reasonable time' guarantee in Article 5 (3) also so far as that guarantee is concerned with the length of criminal proceedings.<sup>1</sup> There is a difference between the two provisions, however, in that the Court has accepted that the fact of detention means that 'special diligence'<sup>2</sup> is required under Article 5 (3) in the conduct of a case in which the accused is detained pending trial. As the Court stated in the *Matznetter* case, 'some delays may in effect constitute violations of Article 5 paragraph (3), while remaining compatible with Article 6, paragraph (1)'.<sup>3</sup>

There is a difference also in the stages of the trial covered by the two provisions, this time making Article 6 the more extensive guarantee. The Court held in the *Wemhoff* case<sup>4</sup> that whereas the Article 5 guarantee ends with the judgment of the trial court, that in Article 6 continues until a final decision in a case has been reached on appeal. Although this limitation on the application of the Article 5 guarantee may well follow from the wording of the Convention, it is unfortunate because it scarcely seems consistent with the bias in Article 5 in favour of freedom of the person. The stumbling block is the word 'conviction' in Article 5 (1) (a) which permits 'the lawful detention of a person after conviction by a competent court'. The Court, correctly it is believed, read Article 5 (1) (a) as taking over once an accused has been convicted by a *trial* court. 'Conviction' could not relate to the final outcome of the case for the reason that if it did there would be no basis in Article 5 for the detention pending appeal of a person convicted by a trial court who had not been detained under Article 5 (1) (c) pending trial. The Court did, however, reject another more restrictive interpretation that was quite possible on the English (but not French) text by which Article 5 (3) would cease to apply at the *beginning* of a trial.

#### THE PRACTICAL VALUE OF THE GUARANTEE

It is not within the scope of this article to review comprehensively the practical value of the Convention as a whole or of the particular guarantee

<sup>1</sup> See *ibid.*, pp. 26-7.

<sup>2</sup> *Matznetter* case, p. 34.

<sup>3</sup> *Ibid.* Cf. *Wemhoff* case ('an accused person in detention is entitled to have his case given priority and conducted with particular expedition'), p. 26, and *Stögmüller* case, p. 40.

<sup>4</sup> *Wemhoff* case, pp. 22-4. Judges Favre and Wold dissented.



concerning pre-trial detention and delay in criminal proceedings. The following comments on certain aspects of the practical value of the latter arising out of the four cases that have been discussed may, however, be of some interest. They are limited to two questions: the relationship between the guarantee and the municipal law of the contracting parties and the effect for an individual applicant of a decision by the Strasbourg Court that a violation of the guarantee has occurred which has injured him.

On the first of these questions, it is evident that for the two legal systems before the Court the guarantee is not set at such a low level as to be of no value in controlling them. As will be recalled, violations of the Convention were found to have occurred in two cases involving one of them and the argument that a breach had occurred in the one case concerning the other was, although unsuccessful, not without merit. In addition to this evidence, resulting from the actual decisions in the four cases, something may be learnt by relating the Court's rulings and other statements therein to the law and practice in other legal systems subject to the guarantee. The following three examples, taken for convenience from English law, will, it is believed, illustrate this point. Before dealing with them, however, it should be noted that even if the guarantee were so out of touch with the municipal law systems subject to it that it could not be said to have any immediate practical value, it would still indicate a lower limit below which no contracting party could allow its legal system to fall.

One feature of English law that has been the subject of criticism on the part of English lawyers<sup>1</sup> concerns the use of prevention of crime as a ground for the refusal of bail. The former Court of Criminal Appeal stated that magistrates should examine an accused person's criminal record when deciding whether to allow bail with a view to refusing it in an appropriate case on the basis of prevention of crime<sup>2</sup> and urged them to refuse bail where the accused had a bad record of convictions and no defence to the case against him because of the danger that he would commit an offence if released.<sup>3</sup> The danger referred to is not that the accused will

<sup>1</sup> See, in particular, Zander, *Criminal Law Review*, 25 (1967), pp. 106-7. The criticism is based more on the presumption of innocence (which is guaranteed in Article 6 (2) of the Convention) than freedom of the person.

<sup>2</sup> *R. v. Armstrong*, [1951] 2 All E.R. 219. See also *R. v. Fletcher* (1949), 113 J.P. 365.

<sup>3</sup> *R. v. Phillips* (1947), 32 Cr. App. Cas 47; *R. v. Pegg* (1955), Crim L.R. 308; *R. v. Wharton* (1955), Crim. L.R. 6; *R. v. Windle*, *The Times*, 6 July 1955; *R. v. Gentry* (1955), 39 Cr. App. Cas. 195. The Court may have had bail after committal for trial in mind only, although in *R. v. Phillips* the Court would appear to have frowned upon bail before committal also. In *R. v. Phillips* the Court distinguished between commonly repeated offences—such as house-breaking—and others and limited its remarks to the former. All of the above cases were decided by the Goddard Court. In *R. v. Aldred* (1962), 106 Sol. Jo. 471, the Court implied that prevention of crime remained a good ground for detention. The Criminal Justice Act 1967, s. 21, as to which see below, p. 104, implies the same. See also s. 18 (5) (g) of the same Act. Note that in *The People v. O'Callaghan* (1966), I.R. 501, the Supreme Court of Eire held that bail could not be refused on the ground of prevention of crime. Note also that in *In re Robinson* (1854), 23

commit a particular offence the likelihood of which might be reasonably suspected at the time that bail is refused; it is instead a danger that he will engage in criminal activity generally, although there is some indication that it must be of a kind similar to that which has led to the existing charge.<sup>1</sup> The object is evidently to deal with the professional criminal who is prepared to commit another offence which he knows will add little to his sentence if he is caught or who wants to provide for his family while he is in prison or both. As indicated,<sup>2</sup> prevention of crime was treated in the *Matznetter* case as a permissible basis for detention in the 'special circumstances' of the case. Whether a different chamber of the Court would take the same approach as was taken there is uncertain. Even if it did, it is not clear whether it would find 'special circumstances' equivalent to those in the *Matznetter* case in a case in which the English Court of Appeal would think a magistrate ought to decline bail.

Secondly, there is the general question of delay in criminal proceedings. In 1969 the Royal Commission on Assizes and Quarter Sessions referred in its Report to 'the recent overloading' of the courts.<sup>3</sup> In respect of criminal proceedings, the Commission noted that at the Old Bailey in 1967 nearly 70 per cent of all accused persons had to wait longer than the eight weeks recommended as an upper limit by the Streathfield Committee in 1961<sup>4</sup> even though 36 per cent of persons within that 70 per cent were in custody.<sup>5</sup> Despite such delays, the time taken in terms simply of calendar months and days is, even in the worst cases, less than that accepted by the European Court as being consistent with the 'reasonable time' requirements in Articles 5 (3) and 6 (1) of the Convention. As has been seen, however, the Court measured the reasonableness of the time taken by reference to what was reasonable according to the kind of system of criminal law administration concerned. On that basis, a much lesser delay might be a violation of the Convention in England than under some civil law systems. Whether the delay which—under any system—results not from lack of efficiency in a particular case but from the general lack of an adequate number of courts or judges, or similar causes, can give rise to a breach of the Convention is not clear.<sup>6</sup>

L.J.Q.B. 286, which has long been regarded as the leading case on bail, Coleridge, J., spoke (at p. 287) only of the probability of the accused's *appearing for trial* (and not of the prevention of crime) when stating the test to be used in the granting of bail.

<sup>1</sup> See *R. v. Armstrong* ('similar offences') cited above, p. 102 n. 2, and the facts, so far as indicated, in the other cases cited in the preceding note. On the other hand, s. 18 (5) (g) of the Criminal Justice Act, 1967, refers comprehensively to 'an offence'. <sup>2</sup> See above, pp. 95-7.

<sup>3</sup> Cmnd. 4153, para. 64. It attributed this to the rise in crime and the increase in legal aid.

<sup>4</sup> Cmnd. 1289, paras. 31-3, 139, 185.

<sup>5</sup> Cmnd. 4153, para. 65.

<sup>6</sup> Note that in 1931 in the *El Oro Mining and Railway Co. claim*, *R.I.A.A.*, vol. 5, p. 191, the British-Mexican Claims Commission ruled that 'the amount of work incumbent upon the (local) Court . . . may explain but not excuse the delay' in finding Mexico liable for a denial of justice. This, of course, was not a case of human rights but of the treatment of aliens.

Finally, it is interesting to consider the provision of the Criminal Justice Act 1967 that permits the setting of other than monetary conditions as conditions for release. S. 21 (1), which would appear to reflect magisterial practice before the Act, states: 'The conditions on which any person is admitted to bail may include conditions appearing to the court to be likely to result in his appearance at the time and place required or to be necessary in the interest of justice or for the prevention of crime.' As to 'appearance', it would seem that such devices as surrendering a passport or periodic reporting at a police station would be allowed. 'The interests of justice' would presumably permit a condition requiring that a person should not contact another person on release or even that he should remain in his house. An example of a 'prevention of crime' condition is probably that recently imposed upon an *anti-apartheid* demonstrator who was released on the basis that he would not attend rugby matches. As noted, the Convention can be read as meaning that only conditions relating to appearance at trial can be imposed. If this is so, s. 21 of the Criminal Justice Act conflicts with it. This, it might be argued, would be unfortunate in view of the purpose of s. 21, which is to permit release on bail where it might otherwise not be possible.<sup>1</sup>

Although other questions might also be raised,<sup>2</sup> these three, it is believed, make the point that the Convention's guarantee may be of some value in at least one legal system subject to the guarantee—this time a common law one—other than those before the court in the cases discussed. It should be stressed, finally, that it is not suggested that any of them show any clear inconsistency with the Convention; it is submitted instead that they demonstrate that the obstacle the guarantee provides is sufficiently serious for Parliament to have cause to take it into account when enacting legislation<sup>3</sup> and for the English courts to have cause to do likewise in the interpretation of ambiguous statutory provisions. The same applies also to any potential applicant under Article 25 of the Convention.

The second question upon which it is intended to comment is that of the effect for the individual applicant of a decision by the European Court

<sup>1</sup> Such an argument, of course, assumes that pre-trial detention on such grounds as the suppression of evidence or the prevention of crime is acceptable in principle.

<sup>2</sup> c.g. the permissibility of other grounds for refusing bail used by the English courts (e.g. that the police have further inquiries to make or that the accused may dispose of the proceeds of the crime) so far as they cannot be brought within one of those accepted by the Court; and, if *In re Robinson* (1854), 23 L.J.Q.B. 286 is still the law on this point, the failure to take into account factors other than those covered by the 'three general questions' proposed by Coleridge J. in that case.

<sup>3</sup> Note, however, that in the parliamentary debates on the amendments to the law of bail in 1967 there is no mention of the Convention. See *Hansard*, H.L., vol. 282, cols. 1430 et seq., vol. 284, cols. 379 et seq. and 559 et seq., vol. 258, col. 78; H.C. vol. 738, cols. 52 et seq., and vol. 751, cols. 771 et seq.; and the *Official Report of the Proceedings of Standing Committee of the House of Commons on the Criminal Justice Bill*, 9th Sitting, 15 February 1967.



that a violation of the guarantee has occurred which has injured him. Following upon such a decision, he may expect reparation from the State adjudged to be in default. The Court's decision is binding upon the latter as a party to the case;<sup>1</sup> it is an authoritative ruling that the defaulting State has violated its treaty obligations, thus giving rise to a customary international law obligation to make reparation.<sup>2</sup> In the context of the Convention it is reasonable to suppose that in a case in which the violation has caused injury to an individual such reparation at least includes reparation for the injured individual—a category within which an individual applicant would necessarily fall. The defaulting State is, however, left free to choose its own form of reparation, subject to the customary international law requirement that 'reparation must, as far as possible, wipe out all the consequences of the illegal act . . .'.<sup>3</sup> The Committee of Ministers of the Council of Europe has responsibility for the supervision of the execution of the Court's judgments<sup>4</sup> and this would seem to include responsibility for ensuring that reparation is made following upon a ruling by the Court that a violation of the Convention has occurred.

If a decision that a violation of the guarantee has occurred were to be taken not by the Strasbourg Court but by a municipal court applying the Convention as a part of its municipal law, it is probable that the court taking the decision would itself be competent to order an appropriate remedy. The Strasbourg Court, however, has only very limited, secondary powers of this sort. The relevant provision is Article 50 of the Convention, which reads:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Article 50 clearly assumes that in the normal case the Court will do no more than declare that a violation has occurred and then leave it to the defaulting State to carry out its obligation to make reparation. The Court can only step in where 'the internal law of the . . . [defaulting State] allows only partial reparation to be made'. The scope and manner of application of this power have yet to be explained by the Court and, since neither is self-evident from the text, they must for the moment remain, to some extent, matters of speculation. As to the scope of the power, Golsong<sup>5</sup>

<sup>1</sup> Article 53 of the Convention.

<sup>2</sup> *Chorzów Factory (Indemnity) (Merits) case*, P.C.I.J., Series A, No. 17, p. 29.

<sup>3</sup> *Chorzów Factory (Indemnity) (Jurisdiction) case*, P.C.I.J., Series A, No. 9, p. 21.

<sup>4</sup> Article 54 of the Convention.

<sup>5</sup> 'Quelques réflexions à propos du pouvoir de la Cour européenne des Droits de l'Homme d'accorder une satisfaction équitable', in René Cassin: *Amicorum Discipulorumque Liber*, vol. 1:

argues that Article 50 is meant to cover the situation in which the defaulting State is not in a position, because of its local law, particularly its constitutional law, to make adequate reparation to the 'injured party' (who, it is clear from the *Stögmüller* case,<sup>1</sup> is the individual injured by the violation). In this situation, the Court 'shall, if necessary, afford just satisfaction' (which, one would imagine, would in most, if not all, cases consist of monetary compensation) to him. On this interpretation the Court might, for example, award monetary compensation in a case where the injured individual is detained by a State within a federation and the federal government is powerless under the constitution to order his release. As to the procedure to be followed, one question is that of timing: when should the Court intervene? On one reading of the text, the Court should take one 'decision', by which it would both decide that a violation has occurred and, in an appropriate case, exercise its power to afford 'just satisfaction'. Golsong,<sup>2</sup> however, argues that Article 50 should be read so that the Court's power is exercisable in two parts. The Court would first declare that a violation has occurred in its judgment on the merits of the case. If subsequently, a sufficient time having elapsed, it proves that the defaulting State has been able to make only 'partial' (or, presumably, no) reparation to the injured individual, the Court might then act under Article 50. In the *Stögmüller* case the Court would seem to have acted on this interpretation. In the *dispositif* in its judgment in that case the Court first ruled that a violation of the Convention had occurred and then continued: 'The Court . . . reserves for the Applicant the right, should the occasion arise, to apply for just satisfaction.'<sup>3</sup> The question of the procedure to be followed should the applicant later apply to the Court (Should he apply direct to the Court or go through the Commission? Would there be a hearing before the Court? If so, would the applicant be a party?) is left undecided.

In many cases the effect of a decision by the Strasbourg Court will, from the standpoint of the individual applicant, depend in part upon the time that it takes for it to be reached. Certainly in cases in which questions of pre-trial detention and delay in criminal proceedings are in issue, the time taken to obtain a ruling will normally be of vital importance. It is relevant, therefore, to note that the evidence of the four cases that have

*Problèmes de protection internationale des droits de l'homme* (1969), p. 89. On Article 50 generally, see 'La réparation des violations de la Convention européenne des droits de l'homme', in *La Protection internationale des droits de l'homme dans le cadre européen* (1961), p. 279.

<sup>1</sup> See below on this page.

<sup>2</sup> *Loc. cit.*, above, p. 105 n. 5.

<sup>3</sup> *Stögmüller* case, p. 45. Cf. the *dispositif* in the *Belgian Linguistics* case (case *Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium* (Merits)), *E.C.H.R.*, Judgment of 23 July 1968, p. 87.

been discussed is that several years may pass between the time that an application is lodged with the Commission and the time that a decision on its merits is reached by the Court. In those cases the time taken from the lodging of the application to the final decision ranged from four years and five months (*Wemhoff* case) to seven years and three months (*Stögmüller* case).<sup>1</sup> This was so even though all four cases were given priority by the Commission. On this evidence the obvious conclusion is that, for the individual who seeks his release or who wants his trial expedited, a ruling by the Court is likely to help only in extreme cases. Admittedly this, even from the individual applicant's point of view, is not the whole picture. The State allegedly in default may take remedial action leading to the settlement of the case, either formally through the 'friendly settlement' procedure or informally, as a result of an application 'having been brought without the case' ever reaching the stage of a final decision. In such a case, the time taken for the applicant to obtain relief may be substantially reduced. Even so, the question of delay in proceedings under the Convention is an important one. If the number of States accepting the right of individuals to petition Strasbourg against them remains constant<sup>2</sup> or increases and if the level of applications coming from them<sup>3</sup> does the same, it appears likely that the situation from the standpoint of the individual applicant will not substantially improve unless the Commission, which is the organ the most subject to pressure of work, becomes a full-time body. Even then, administrative problems (e.g. those of language and travel) characteristic of international procedures will make for some delay. In addition, there is also, unavoidably, the time that has to be taken (sometimes fruitfully, of course) to exhaust local remedies before an application can even be lodged.

If the time element may in some cases impair for an individual applicant the value of a decision by the Court applying the guarantee concerning pre-trial detention and delay in criminal proceedings, it is as well to remember when considering the over-all value of the guarantee that the Convention does not set out, at least primarily, to offer a remedy for an individual who is the victim of a violation of any part of it. Although such a person may, in accordance with Article 25, bring an application alleging a violation affecting him, such application is not, in the scheme of the Convention as it was eventually drafted, the initiation of proceedings for the enforcement of a legal right of the individual in question; it is instead one of two ways of bringing to the attention of the Strasbourg authorities

<sup>1</sup> The same sort of time scale applies in cases which are decided by the Committee of Ministers under Article 32 of the Convention, instead of by the Court.

<sup>2</sup> Eleven States accept the right at the moment.

<sup>3</sup> The figures for the last few years are as follows: 1965, 310; 1966, 303; 1967, 445; 1968, 449; 1969, 439. The figure for 1970 (as far as 1 September 1970) was 260.



a possible breach of the *inter-State* collective guarantee in which each of the contracting parties has agreed to participate. The function of an individual application, like that of a State application, is to bring to light a possible violation of a treaty obligation owed by each contracting party to the others as a whole. This limited role of the individual is confirmed in proceedings before the Court, to which the individual applicant cannot be a party and which he cannot even initiate. If, as the Court has made clear<sup>1</sup> and Article 50 indicates, the individual applicant is not entirely forgotten, it is none the less the case that the primary purpose of the Convention is to ensure that the municipal law of the contracting parties generally conforms to its requirements rather than to provide an international remedy for a person injured in any particular case.

### CONCLUSION

The four cases discussed clarify the meaning of the Convention's guarantee of the rights of the defendant in matters of pre-trial detention and delay in criminal proceedings in several respects. They establish that the 'reasonable time' requirement in Article 5 (3) provides a basis for reviewing the grounds upon which a defendant continues to be detained pending trial as well as one for controlling the speed with which such proceedings occur. Further, they show that appearance at trial, suppression of evidence, and prevention of crime can be permissible grounds for continuing detention, and give some indication of when this is so. The same 'reasonable time' requirement in Article 6 (1), which concerns all criminal cases whether the defendant has been detained pending trial or not, has twice been applied with the result that (1) the civil law system of criminal procedure as found in two of the States parties to the Convention has been held to be basically compatible with the Convention and (2) the standard of diligence required in applying a given system of criminal procedure is not, as it was applied by the Court in the two cases, a very high one. The 'reasonable time' guarantee in Article 5 (3) has been held to apply from the time of arrest as far as the decision of the trial court only. In contrast, the same guarantee in Article 6 (1) has been held to apply from the time that the defendant is charged to the final decision on appeal. On the other hand, it has been established that the time taken to prosecute a criminal case when the defendant is detained is to be judged by a stricter standard of diligence than when he is not. Finally, as far as conditions that may be attached to release pending trial are concerned, the Court has given some indication of the sort of conditions that may or may not be imposed to ensure appearance at trial; it has also not acted inconsistently

<sup>1</sup> *Lawless* case (Preliminary decisions and questions of procedure), Judgment of 14 November 1960, *Yearbook of the European Convention on Human Rights*, 3 (1960), p. 492, at p. 512.

with the view that only conditions designed to ensure appearance at trial may be made.

The guarantee is of some practical value in the sense that it does not function at such a low level that it is of no help in controlling the municipal law systems subject to it. The guarantee provided a sizeable hurdle for the legal systems before the Court in the cases discussed and it would also seem to be such for at least one other legal system subject to it. It would, in any event, set a limit below which contracting parties could not allow their legal systems to fall.

It is also of practical value from the standpoint of the individual applicant, who may expect to obtain some form of reparation as a result of a decision by the Court that a violation of the Convention has occurred that has injured him. This will follow from the fulfilment by the defaulting State of its obligation to make reparation for the breach of a treaty obligation. Normally the measures to be taken will be left to the defaulting State; only exceptionally has the Court competence to intervene. The value of a decision by the Court favouring the individual applicant may be impaired in some cases by the time it takes for an application to be finally ruled upon by the Court. Offsetting this to some extent is the fact that an application may lead to a satisfactory settlement of a case before it is decided by the Court. It needs also to be remembered that the primary purpose of the Convention is not to offer an international remedy for individual victims of violations of the Convention but to provide a collective, inter-State guarantee enforceable through Strasbourg that will benefit individuals generally by requiring the municipal law of the contracting States to keep within certain bounds.





# INTERNATIONAL LEGAL PERSONALITY AND IMPLIED POWERS OF INTERNATIONAL ORGANIZATIONS\*

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## INTRODUCTION

THE rapidly increasing importance of international organizations,<sup>2</sup> and the fact that the International Court of Justice during its comparatively short period of existence has been called upon several times to deal with questions related to their international personality and to the legality of functions and powers exercised by them, have generated much learned discussion and differences of view. The purpose of the present article is to undertake an examination of the legal foundation and content of the personality of international organizations and of their nature as subjects of international law. This in turn calls inevitably for some, though not an exhaustive, examination of the doctrine of the implied powers of international organizations and for some analysis of the general concept of personality in international law.

It is proposed to discuss these matters in five Parts, arranged as follows:

Part I. Different approaches to the personality of international organizations.

II. The practice of international organizations and its need for a legal foundation.

III. The approach adopted by the International Court of Justice in the *Reparations* case.

IV. The legal consequences of personality in international law.

V. The doctrine of implied powers as applied to international organizations.

The article will end with a sixth Part stating some further considerations and giving the writer's final conclusions.

## PART I

### DIFFERENT APPROACHES TO THE PERSONALITY OF INTERNATIONAL ORGANIZATIONS

The existence and extent of the legal personality of international organizations has been examined by writers employing four main

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<sup>2</sup> In this article the expression 'international organizations' is used as denoting intergovernmental organizations.

approaches.<sup>1</sup> Two are concerned with the method of determining whether or not an organization possesses international personality: these are the inductive and the objective approaches; the other two are concerned with the legal consequences attaching to the concept of personality: these are the formal and the material approaches.

### 1. *The inductive approach*

The inductive approach starts from the basis of the existence of certain rights and duties expressly conferred upon the organization, and derives from these particular rights and duties a general international personality. Those who adopt this approach generally link it with the foundation of the personality on the will of the States concerned either expressed or implied in the constituent instrument. For this approach, personality becomes a point of arrival rather than a point of departure.<sup>2</sup>

### 2. *The objective approach*

The objective approach tends to discern the international personality of an organization in specific elements pertaining to the structure of the organization itself. Once the existence of these prerequisites is confirmed, the personality of the organization is established. Although the objective elements are said to be found in the constitutive instrument of the organization, those who adopt this approach normally tend to consider that the foundation of the personality is not the will of the States but is to be discovered in general international law. In other words, it is the international legal order which automatically ascribes personality to an entity fulfilling certain conditions.<sup>3</sup>

But even when by one or other of these approaches—inductive or objective—writers may have been led to detect the international personality of a given international organization, there is still no agreement upon the legal consequences to be assigned to that concept, and this is the most important aspect of the problem. Some writers adopt a ‘formal’ point of view of the legal consequences of personality; others a material one.

### 3. *The formal approach*

This approach holds that no specific rights or duties emerge from the fact that an organization is endowed with international personality, but

<sup>1</sup> It is not intended in this paper to deal with the problem of the opposability of the legal personality to non-member States.

<sup>2</sup> See, for instance, Bowett, *The Law of International Institutions* (1964), pp. 274–5. See, also, Brownlie, *Principles of Public International Law* (1966), p. 520; Brownlie includes ‘the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more States’ among the legal criteria of personality in international organizations.

<sup>3</sup> See, for instance, Seyersted, *Objective International Personality of International Organizations* (1963), pp. 46 et seq.

that it is necessary to have recourse to the provisions of the instrument setting up the organization. Thus Brownlie,<sup>1</sup> writes:

Particular care should be taken to avoid an automatic implication from the very fact of legal personality of particular powers, such as the power to make treaties with third States or the power to delegate powers. . . .

Ingrid Detter, again, says:

. . . to us, the concept of personality does not say anything about the qualities of the person: it may be a State, it may be an organization, it may perhaps even be an individual. The fact that, for example, an organization has international personality does not indicate that it will enjoy any particular rights.<sup>2</sup>

O'Connell also takes this approach:

It is a mistake to jump to the conclusion that an organization has personality and then to deduce specific capacities from an *a priori* conception of the concomitants of personality. The correct approach is to equate personality with capacities and to inquire what capacities are functionally implied in the entity concerned.<sup>3</sup>

It is thought that this approach is correct in so far as it points out the existence of different subjects of international law with a distinct nature and as a consequence with different rights and duties on the international plane; but it begs the question by taking it for granted that in the case of intergovernmental organizations no powers or category of rights attach to the concept of their personality, which is the very question to be solved. It may be granted that being a subject of international law does not entail the same consequences for States as for international organizations, but this does not by itself prove that international personality is nothing but a label. As Jiménez de Aréchaga points out, international personality on this basis would become merely a descriptive notion, lacking practical usefulness, since it would serve neither to enlarge the scope of the competence of these special subjects of international law nor to accord to them the attributes common to the typical subjects.<sup>4</sup> This approach also leads to a pluralistic conception of the law of international organizations and tends to reduce the possibilities of a general theory's being built upon them. Kasme is thinking along these lines when he says:

Nous nous demandons si, en fait, toutes les organisations internationales ne sont pas des sujets *sui generis*, en ce sens que chacune d'elles possède des droits particuliers qui ne sont pas identiques à ceux des autres.<sup>5</sup>

<sup>1</sup> Brownlie, *Principles of Public International Law* (1966), p. 527.

<sup>2</sup> Detter, *Law-making by International Organizations* (1965), p. 21 (text and n. 1).

<sup>3</sup> O'Connell, *International Law*, vol. 1, p. 109.

<sup>4</sup> Jiménez de Aréchaga, *Curso de derecho internacional Público* (1959), vol. 1, p. 276.

<sup>5</sup> Kasme, *La Capacité de l'ONU de conclure des traités* (1960), p. 26.



As will be seen in due course, this approach cannot be considered as reflecting faithfully the development of international law on the matter.<sup>1</sup> Some writers<sup>2</sup> have classified the theories falling within this formal approach into two groups: the theory of delegated powers and the theory of implied powers. This sharp dichotomy, however, does not appear to be justified. The doctrine of delegated powers would mean that an international organization can enjoy only those rights expressly enumerated in its constitution. The theory of implied powers would mean that an organization possesses also those functions and powers which, although not expressly granted in its constitution, 'are conferred upon it by necessary implication as being essential to the performance of its duties'.<sup>3</sup> These two doctrines are really identical in their foundation and complementary in their effects. Moreover, no writer, not even Kelsen or Hackworth, who are described as the leaders of the doctrine of delegated powers,<sup>4</sup> has carried that doctrine so far as to exclude absolutely every other right not expressly conferred upon the organization by its constitution. Kelsen, for instance, who is supposed to take a restrictive view,<sup>5</sup> thinks that 'as the United Nations is an international juridical person it may have the right of active and passive legation',<sup>6</sup> although the Charter contains no specific provision to that effect.

Hackworth, a dissenter from the opinion of the Court in the *Reparation* case, which is usually considered to endorse the delegated powers theory,<sup>4</sup> is in truth a convinced supporter of the theory of implied powers. He concurs in the Court's conclusion that the United Nations has the capacity to bring an international claim with a view to obtaining the reparation due in respect of damage caused to the organization, because this is a 'proper application of the implied powers doctrine'.<sup>7</sup> He disagrees with

<sup>1</sup> See below, p. 124, and Parts III and IV.

<sup>2</sup> Cf. Seidl-Hohenveldern, *Revue égyptienne de droit international*, 21 (1965), p. 38; Seyersted, *United Nations Forces in the Law of Peace and War* (1966), p. 143; Abdullah El Brian, *First Report on Relations between States and International Organizations*, Doc. N.U. A/CN4/161, p. 55.

<sup>3</sup> *I.C.J. Reports*, 1949, p. 182.

<sup>4</sup> Cf. Seyersted, *op. cit.* (n. 2, this page), p. 143; also this *Year Book*, 37 (1961), p. 447.

<sup>5</sup> Kelsen, *The Law of the United Nations* (1957), p. 330. Indeed, Kelsen's position is somewhat more complex than it is usually understood. Kelsen maintains rather a material point of view of personality. His definition is as follows: 'Juridical personality means the capacity of being a subject of legal duties and legal rights, of performing legal transactions and of suing and being sued at law' (*ibid.*, p. 329). His restrictions concern the criteria to take into account in order to determine when an organization possesses full international personality. In his view two possibilities arise: (a) There is an expressed provision conferring international legal personality upon the organization: in this case, the organization enjoys full legal capacity as defined above. A true formal approach even in these circumstances would derive no legal consequences as to the actual capacities of the organization. (b) There is not such an expressed provision. In this case there is a splitting up of the legal capacities inherent to personality and the organization 'has only those special capacities as conferred upon it by particular provisions'.

<sup>6</sup> *Ibid.*, p. 335.

<sup>7</sup> *I.C.J. Reports*, 1949, p. 197.

the Court in that he considers the organization has no capacity to become a sponsor of claims on behalf of its employees,<sup>1</sup> because

. . . no necessity for the exercise of the power here in question has been shown to exist.<sup>1</sup>

Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are necessary to the exercise of powers expressly granted.<sup>1</sup>

Weissberg takes a somewhat indefinite position.<sup>2</sup> In seeking to establish whether or not the United Nations possesses international personality, he analyses its constitutional provisions and practice relating to the following matters: treaties; Korea and the restoration of international peace and security; the international emergency force; privileges and immunities and capacities to espouse claims. This analysis leads Weissberg inductively to affirm: 'Our brief summation demonstrates that the United Nations is endowed with international legal personality and shows some of the facets of that personality.'<sup>3</sup> Weissberg's thesis is obscured by a prodigal and indiscriminating use of terms, sometimes employing the same term with different meanings and sometimes different terms with the same meaning. This criticism might seem only terminological; but it becomes substantial as soon as one realizes that, as will be pointed out later, under the complex of the potential activities of an organization lie different juridical realities with distinct legal consequences which must be the object of a careful distinction. According to Weissberg, an entity endowed with personality may 'achieve its primary ends . . . assume additional powers and thus enlarge its capacities'.<sup>3</sup> But, he insists, 'this is not to say that personality empowers the organization to accomplish tasks for which it was not founded.'<sup>3</sup> Yet, he maintains that

. . . the interpretation or detailed application of a particular function is frequently more significant than the original power itself, and often leads to the assumption of new additional or unforeseen functions . . . it must not be overlooked that as a result of such an exercise the entity has undertaken new objectives not specified by the constitution. . . .<sup>4</sup>

And he further writes:

The execution of an objective by means not specifically listed in the Charter increases the capabilities of the Organization. An application of a particular function often leads to the exercise of additional or new functions, which may be of greater relevance than the original purposes. Yet it must be realised that these are derivative powers.<sup>3</sup>

<sup>1</sup> 'As to the organization, we find nothing to suggest that it too has capacity in this field. Certainly, there is no specific provision in any other agreement of which I am aware, conferring upon the organization authority to assume the role of a State and to represent its agents in the espousal of diplomatic claims on their behalf. I am equally convinced that there is no implied power to be drawn upon for this purpose.' Cf. *ibid.*, p. 198. See also below, pp. 148-9.

<sup>2</sup> Weissberg, *The International Status of the United Nations* (1961).

<sup>3</sup> *Ibid.*, p. 203.

<sup>4</sup> *Ibid.*, p. 24.

Summing up, Weissberg maintains that, in addition to what is set forth in its constitution, an organization may enlarge its powers and its capacities, assume new functions, undertake new objectives, increase its capabilities and exercise new functions of greater relevance than its original purposes. The only limit thus would be that the organization is not empowered 'to accomplish tasks for which it was not founded nor is the principle capable of closing every *lacuna*'.<sup>1</sup> But Weissberg does not make clear by what criterion new tasks which the organization may not adopt are to be distinguished from new objectives, purposes, functions, etc., which the organization may apparently adopt.

He finally affirms that an organization endowed with international legal persona<sup>1</sup> ty can undertake two types of functions:

- (a) Primary ones: i.e. 'those which are specifically delegated and enumerated in the constitutive instrument'.
- (b) Derivative ones: i.e. all others, which he subdivides into two classes: those which may be implied, deriving from the primary functions; those which are of an auxiliary nature, 'deriving not only from the primary functions of the entity but also from its international legal personality'.<sup>1</sup>

However, he does not make clear whether those 'derivative functions of an auxiliary nature' are a common group or a category of rights enjoyed by every international organization endowed with international personality. He does not seem to think so, since he also links those rights to the 'primary functions of the entity', which vary with each organization. He would therefore appear to base himself on an essentially 'formal' approach.

#### 4. *The material approach*

In contrast, the 'material' approach, once the international personality of the organization has been verified, attaches to this concept precise legal consequences in regard to the potential activities of the organization. For writers adopting this approach the legal consequences may vary in their nature or degree. But the essential feature common to them is the fact that they identify a certain category of rights and duties which they consider to arise from the very personality of the organization, and thus to be enjoyed by every organization constituting an international person irrespective, in principle, of the particular provisions of the constitution. The provisions, in their view, may be useful indicators of the personality but do not determine its content.

Among exponents of the material approach can be included Carroz and Probst. To these authors,

<sup>1</sup> Weissberg, *op. cit.* (above, p. 115 n. 3), p. 203.



... une organisation est dotée de la personnalité juridique si elle est conçue comme entité autonome, capable d'exprimer une volonté propre et si elle est pourvue de compétences. De cette personnalité résulte pour l'organisation le droit d'utiliser tous les moyens que l'ordre juridique international met à la disposition de ses sujets pour exercer leurs compétences et faire respecter leurs droits.<sup>1</sup>

This position, which is seductive enough at first glance, runs into several difficulties in its application. According to Carroz and Probst, the legal consequences arising from the personality of an organization are the right to employ all the means that the international legal order puts at the disposal of its subjects (*a*) for the fulfilment of their competences and (*b*) for asserting their rights. The second consequence is sufficiently clear, since it comprises all the rights related to bringing a claim on the international plane (protest, request for submission to an arbitral tribunal, etc.). But as to the first, the concept 'means for the fulfilment of its competence' is too vague to be taken as a test for determining the legal consequences of personality. Theoretically, it is easy to appreciate the abstract relationship means-end; but practically it is difficult to draw the line between them because nothing is intrinsically an end or a means.<sup>2</sup> It all depends on the subjective criterion or perspective which is applied. According to Carroz and Probst the consequences of international personality are not concerned with the extent of the competences but with their exercise. It would, however, be simple for an organization to enlarge its competence by considering as a 'means' for the fulfilment of its original purposes tasks for which it was not created and clearly outside the natural interpretation of its constitution and which are opposed by a minority. What then is to be the dividing line between assuming a new competence and performing new tasks as a 'means' to fulfil a competence already established? For instance, the use of the high seas *inter alia* for merchant ships is one of the rights of a State and, as such, one of the means at its disposal for fulfilling a competence possessed by it, namely the development of its international trade. Could the World Health Organization organize a merchant fleet using the high seas to transport goods not related to its purpose between countries just as a State may do, on the ground that the profits from this activity go to finance the original purposes of the organization? There is a risk not only of exceeding the purposes and functions for which the organization was created but also of overlapping the competence of other organizations. On the other hand, if the relationship 'means-end' is given a certain content of 'necessity' or 'implication' there is no need to have recourse to the concept of personality to

<sup>1</sup> Carroz and Probst, *Personnalité juridique internationale et capacité de conclure des traités de l'ONU et des institutions spécialisées* (1953), p. 86.

<sup>2</sup> 'Everything on earth can be used as a means to an end and misused.' Cf. Kunz, *The Changing Law of Nations* (1968), p. 118.

derive those auxiliary rights, the enumeration of which would vary with each organization; the foundation of those rights could easily be found in the theory of implied powers already admitted by international tribunals. In other words, by trying to give an answer to what is the content of the concept of personality, Carroz and Probst either suggest too large a category of rights for it to be possible to draw a line between personality and competence or else bring themselves within the theory of implied powers. In both cases the content is neither clear nor unequivocal. The defined content of their position is, however, that it ascribes to international personality a category of rights consisting of those 'means which the legal order puts at the disposal of its subjects for asserting its rights'.

Italian doctrine has also contributed to the 'material' approach to the international personality of intergovernmental organizations.

To Sereni,<sup>1</sup> the same reasons which lead to rejecting the possibility of a juridical incapacity in the case of States hold also for international organizations when these are endowed with legal personality. Sereni considers only two possible limitations on this personality: (a) conventional limitations; (b) factual limitations, related to their very structure and historic origin. But for these two kinds of limitations, the organizations 'are free to act as they like; also in their respect, as in the case of the States, the concept of personality and that of liberty are assimilated'.<sup>2</sup> For instance, he considers that international organizations, owing to their factual limitations, cannot wage war since they possess neither people nor territory, even although they may possess armed forces, owned by them or under their direction (for instance U.N.E.F.) as well as exercise powers upon a territory (proposed administration of Trieste by the United Nations).<sup>3</sup>

Balladore Pallieri<sup>4</sup> for his part, although extremely conservative as far as the attribution of international personality is concerned,<sup>5</sup> holds a very wide view of the extent and degree of the personality. To him an organization endowed with legal personality enjoys a full legal capacity *vis-à-vis* member, as well as non-member, States. And he expressly states:

They do not perform all State activities due only to a factual impossibility or to a lack of interest in fulfilling them and not because of a true incapacity of their own.<sup>6</sup>

These propositions are open to the same criticism as we must now make of Seyersted's position. He is perhaps the strongest supporter of the

<sup>1</sup> Sereni, *Diritto internazionale* (1960), vol. 2, p. 847.

<sup>2</sup> Ibid., p. 848: 'sono liberi di agire come vogliono; anche per essi come per gli stati, i concetti di personalità e di libertà si identificano.'

<sup>3</sup> Ibid., p. 848.

<sup>4</sup> Balladore Pallieri, *Diritto internazionale pubblico* (1962).

<sup>5</sup> Cf. *ibid.*, pp. 178 et seq.

<sup>6</sup> Ibid., p. 206.

material approach.<sup>1</sup> He holds a very wide view both of the criteria which determine international personality and of the legal consequences attached to it, which he calls 'inherent powers'. To Seyersted, intergovernmental organizations and States are on an equal footing from the point of view of their legal capacities:

International organizations, like States, have an inherent legal capacity to perform any 'sovereign' or international act which they are in a practical position to perform. They are in principle from a legal point of view general subjects of international law, in basically the same manner as States.<sup>2</sup>

In his view the international personality of international organizations is not based on the provisions of the constitution or the intention of its framers but on the objective fact of its existence. This personality is founded on 'general and customary international law'<sup>3</sup> as is sufficiently proved by practice.<sup>4</sup> According to Seyersted, from the international point of view the only legal limitations on the inherent powers of an international organization are: (a) negative provisions of the constitution forbidding the organization to perform certain acts;<sup>5</sup> (b) the purposes of the organization;<sup>6</sup> and the fact that (c) no organization can make decisions binding upon the member States or exercise jurisdiction over their territory, nationals, or organs without special legal basis.<sup>7</sup> Other limitations would be only factual, not legal.

Seyersted's thesis seems open to two main criticisms. In the first place, he tries to find in the practice of international organization a clear equation of organizations to States, but makes no attempt to determine whether all those 'international acts and capacities', all those activities of international organizations, really form a common category which may be considered

<sup>1</sup> See Seyersted, *Objective International Personality of Intergovernmental Organizations* (1963); 'International Personality [etc.] . . .' in *Indian Journal of International Law* (1964); 'United Nations Forces', this *Year Book*, 37 (1961); *United Nations Forces in the Law of Peace and War* (1966).

<sup>2</sup> Seyersted, *Objective International Personality of Intergovernmental Organizations* (1963), pp. 28-9.

<sup>3</sup> *Ibid.*, p. 100.

<sup>4</sup> *Ibid.*, pp. 21-9.

<sup>5</sup> *Ibid.*, p. 29.

<sup>6</sup> *Ibid.*, p. 35.

<sup>7</sup> Indeed, as will be seen later, these are not limitations to the international personality of organizations but manifestations of the principle of functional limitation. The relationship between an organization and its member States in the plane of international law may be of two kinds: relations as persons in international law or, in addition, relations arising out of their membership of the organization.

The former are made possible by the international personality of the organization; the latter, by the functions and powers expressly or by implication delegated by the States to the organization. Thus the conclusion of a treaty between the organization and member States is a manifestation of its international personality (regardless of its content, the constitutionality of which depends of course on the purposes and functions); but the adoption of recommendations or of binding decisions towards members rests on the extent of functions and powers granted by the States to the organization, as does the right to exercise direct jurisdiction over territory, nationals or organs of member States, usually called 'supranational powers'. Cf. below, pp. 139-44.



as a necessary consequence of personality. His position is so broad that it leads him to attach to the concept of personality things as different as the right to conclude treaties, the right freely to organize its internal functioning,<sup>1</sup> the right to maintain military forces<sup>2</sup> and the right to operate ships under the flag of the organization.<sup>3</sup> Underlying this position there is the general assumption that international personality is to be equated with the 'totality of rights and duties of the State' in the sense that all those rights and duties attach to a State *because* it is an international person and they are inherent in the concept of personality or the notion of a 'general subject of international law'. Accordingly, if international organizations enjoy certain rights or are bound by duties which exceed the provisions of the constitution and coincide with certain rights and duties of States, the conclusion for Seyersted is that 'they are . . . general subjects of international law in basically the same manner as States',<sup>4</sup> or as Balladore Pallieri says, 'they do not engage in all State activities only because of a factual impossibility or lack of interest in engaging in them and not because of a true incapacity of their own'.<sup>5</sup> This attempt to equate States and international organizations as subjects of international law, it will be observed, leads to an arbitrary and artificial transfer of concepts from one sphere to the other; and not least, the concept of sovereignty.<sup>6</sup>

The second main criticism is that in this doctrinal position the concept of functions of international organizations—in so far as they may be internationally relevant—becomes submerged within the all-embracing concept of 'inherent powers' to perform 'any sovereign or international act'.<sup>7</sup> Within this concept 'two things at least are embodied: the way in which an organization expresses its will and the function or subject-matter or object of international law<sup>8</sup> to which that expression of will applies. The dichotomy becomes then, acts-purposes: it is for the States to fix a certain aim or goal for the organization they create; it is for the organization to decide

<sup>1</sup> In the *Administrative Tribunal* opinion the I.C.J. upheld the right of the United Nations to create an Administrative Tribunal as arising 'by necessary intendment out of the Charter' and not out of the international personality of the organization: *I.C.J. Reports*, 1954, p. 57. See also Seidl-Hohenveldern, loc. cit. (above, p. 114 n. 2), p. 49, who expresses the view that 'any private company is just as free to organize and reorganize its office, establish new departments, split up existing ones, etc.'.

<sup>2</sup> Seyersted, *United Nations Forces in the Law of Peace and War* (1966), p. 160.

<sup>3</sup> Seyersted, *Objective International Personality of Intergovernmental Organizations* (1963), p. 27.

<sup>4</sup> Ibid., pp. 28-9.

<sup>5</sup> Balladore Pallieri, op. cit. (above, p. 118 n. 4), p. 178.

<sup>6</sup> See Seyersted, *Objective International Personality of Intergovernmental Organizations* (1963), p. 48.

<sup>7</sup> The same can be said of Balladore Pallieri's view that international organizations can perform all 'State activities'.

<sup>8</sup> In the sense Schwarzenberger uses this phrase; cf. *International Law* (3rd ed., 1957), vol. 1, pp. 289-418.

how to achieve that goal by performing any 'sovereign or international act'. Accordingly he writes:

In many cases provisions specifying otherwise inherent powers may be useful or even necessary precisely from the point of view of internal distribution of functions. But in other cases they are superfluous and merely create confusion, by tempting legal writers either to draw 'a contrario' conclusions which would impose upon the organization concerned restrictions which do not apply to other organizations, which were not intended by the draftsmen and which have not been observed in practice—or else to resort to strained interpretations of provisions which were never meant to cover the point.<sup>1</sup>

And in another passage:

Indeed it is submitted that if the constitutionally competent organs have decided, under the procedure prescribed in the constitution, that the organization shall perform a specific act in order to attain a purpose within the scope of its constitution, then a Court cannot declare the act invalid because in its view, the aim could have been attained without resorting to that act, or because it otherwise does not consider the act 'essential' or 'necessary' for the attainment of that aim.<sup>2</sup>

The origin and inapplicability to international organizations of these broad concepts of 'act' or 'powers' will be explained in the fourth part of this article.<sup>3</sup> Clearly, however, Seyersted's thesis overlooks the undeniable fact that the constitutions of organizations are drawn not only in terms of purposes but also of functions; and that States thereby establish a principle of the limitation of the functional means because part of the sovereign decision of the States creating the organization is to determine not only its aims but also the appropriate means to attain those aims. Moreover, international tribunals have repeatedly had recourse to that concept as inherent to the law of international organizations.<sup>4</sup>

For instance, Seyersted considers that the advisory opinion of the International Court of Justice in *Certain Expenses of the United Nations* endorses the doctrine of inherent powers.<sup>5</sup> However, the Court did not have recourse to the concept of personality of the organization as the foundation of the legality of the operation of the United Nations Forces and of the right of the organization to create them, as it did in the *Reparation* case in justifying the right of the organization to bring an international

<sup>1</sup> Seyersted, 'United Nations Forces', this *Year Book*, 37 (1961), pp. 458–9 (n. 4).

<sup>2</sup> Ibid., p. 455; and *United Nations Forces in the Law of Peace and War* (1966), p. 155.

<sup>3</sup> See below, pp. 140–4, and p. 138 n. 4.

<sup>4</sup> See below, pp. 129–31 and 147–53. As early as in 1927, referring to the European Commission of the Danube, the P.C.I.J. stated: 'As the European Commission is not a State, but an international person it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power ('compétence' in the French version) to exercise these functions to their full extent, in so far as the statute does not impose restrictions upon it'; *P.C.I.J.*, Ser. B, No. 14, p. 64.

<sup>5</sup> Seyersted, *Objective International Personality of Intergovernmental Organization* (1963), p. 99.

claim.<sup>1</sup> On the contrary, the Court expressly took note of the purposes and functions of the organization to uphold the legality of the action as well as the right to establish the forces and gave to the concept of function a decisive importance, thereby confirming the principle of functional limitation:

The Court agrees that such expenditures must be tested by their relationship to the purposes of the United Nations. . . . These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. . . .<sup>2</sup>

It is because the Court found that 'the action in question is within the scope of the functions of the Organization'<sup>2</sup> that the action was considered legal and also, in consequence, the expenditures incurred to carry it out. In other words, the creation of armed forces by an organization is not a right or inherent power arising from international personality but a function which must be expressly or impliedly recognized in the constitutive document.<sup>3</sup>

Despite the above observations, the 'material' and 'objective' approaches appear to provide the correct means of focusing the problem of the legal personality of international organizations. Certainly, in order to determine what is the present position in international law on this matter, recourse must be had to the practice of the organizations, to the provisions of their constitutions, to the decisions of international tribunals, as well as to the principles of international law in the field of the international personality of States.

## PART II

### THE PRACTICE OF INTERNATIONAL ORGANIZATIONS AND ITS NEED FOR A LEGAL FOUNDATION

#### 1. *The practice*

Unquestionably, practice shows that in implementing their purposes international organizations carry out many activities and exercise many rights for which there is no express provision in their constituent documents. The question then arises whether or not this practice is lawful and if so, what is its legal foundation. One conclusion which may be drawn from the preceding chapter is that writers, whatever may be their theoretical point of departure, have this in common that they justify at least some of the rights which international organizations enjoy in practice without their

<sup>1</sup> See below, pp. 126-9.

<sup>2</sup> *I.C.J. Reports*, 1962, p. 167.

<sup>3</sup> This function is different from the right of States to wage war recognized by customary international law and curtailed by the United Nations Charter. See below, p. 143 n. 1.



being expressed in their constitution. Although it is not intended here to make a complete study of that practice, which has already been sufficiently explored by writers, it is hoped that a short survey of it may help to show whether all those activities which legal writers have tried to justify *en bloc* by using one or other legal foundation must really be taken as a whole, or whether distinctions must be drawn. Are the 'material' approach, as conceived by Sereni, Pallieri and Seyersted, and the 'formal' approach of the theory of implied powers capable of reconciliation, or can precise fields be found in which personality and implied powers work independently? The activities or rights which, as practice shows, international organizations carry on or enjoy in spite of the silence of their constitutions are extremely varied. International organizations have concluded treaties, made use of the high seas with ships flying their own flag, created international peace forces, convened international conferences with representatives of States and other international organizations, organized internally the functioning and procedure of their organs, sent diplomatic representatives to member and non-member States and received permanent missions from member States, undertaken administration tasks in certain territories, presented protests to States and brought claims into the international plane, and have participated in the activities of other international organizations with envoys, observers, etc.<sup>1</sup>

The question of finding a correct legal foundation for all these varieties of practice is not of theoretical interest alone; it also has important practical consequences. If all these activities have their legal basis in the personality of the organization, it is sufficient that an organization should possess international personality for it to have the legal capacity to perform them. On the other hand, if they have their basis in implied powers the question will be posed in different terms for each organization. Likewise, member States will in each case possess the right to claim that certain activity of the organization does not conform to, or goes beyond, the purposes and functions expressed or implied in the constitutional provisions and therefore to refuse to collaborate financially or otherwise in its carrying out; they will be entitled to do so on the simple ground of legality, because it is their right as members to insist that the limitation of sovereignty which results from their agreement to be bound by a majority decision will only be applied in that frame of activities which they consented to grant the organization in subscribing to the constituent instrument.<sup>2</sup> If all these

<sup>1</sup> For a more complete study of the practice of these organizations see particularly Seyersted, *Objective International Personality of Intergovernmental Organizations*, (1963), pp. 21 et seq., 'International Personality . . . , etc.' in *Indian Journal of International Law* (1964), pp. 1-19 and *United Nations Forces in the Law of Peace and War* (1966), pp. 143-51; see also Seidl-Hohenveldern, loc. cit. (above, p. 114 n. 2), p. 46.

<sup>2</sup> Cf. *I.C.J. Reports*, 1962, p. 167: 'Save as they have entrusted the organization with the attainment of these common ends the Member States retain their freedom of action.'

activities are based on the international personality of the organization, they cannot be assailed simply on the ground that they are not expressly foreseen in the constitutional provisions. But, if they have their basis in the implied powers doctrine, an international tribunal might hold them to be unlawful on the ground that they do not constitute a 'necessary implication'<sup>1</sup> or that they are not 'essential to the performance of its duties'<sup>1</sup> or that they are not 'within the scope of the functions of the organization'.<sup>2</sup>

## 2. *The true position*

It is submitted that both the material concept of personality and the concept of implied powers have their respective spheres. The two principles are not contradictory, each one having a special field of application. The personality of international organizations derives from certain objective criteria, and it gives rise to certain categories of rights which enable the organization to manifest itself as a distinct entity on the international plane and enter into relationship with other subjects of international law, even if those rights are not mentioned in the constitution. The concept of implied powers must in turn be applied to the functions of the organization when certain other powers or functions not provided in the constitution are essential or necessary to implement the purposes or functions already established in the constituent document. But this concept is not the basis of the rights arising from personality, just as personality is not the basis of implied powers.

# PART III

## THE APPROACH ADOPTED BY THE INTERNATIONAL COURT OF JUSTICE IN THE *REPARATION* CASE<sup>3</sup>

### 1. *The personality of an organization and its legal consequences*

At this point it is necessary to indicate the line of reasoning followed by the Court in the *Reparation* case. What is most important to the understanding of the opinion of the Court is believed to be the reasoning which it followed in arriving at its conclusion: namely its finding of international personality in the existence of objective characteristics fulfilled by the organization, and its recourse to the concept of international personality in order to derive from it the right of presenting an international claim.

<sup>1</sup> *I.C.J. Reports*, 1949, p. 182.

<sup>2</sup> *Ibid.*, 1962, p. 168.

<sup>3</sup> *Reparation for Injuries suffered in the Service of the United Nations*, *I.C.J. Reports*, 1949, p. 174.

This is the structural and guiding line of thought of the Court which has not been sufficiently emphasized by doctrine. The latter tends to interpret the opinion of the Court as basing the right to present an international claim on an implied powers argument, which is not the case. On the contrary, this opinion is the only instance in which an international tribunal has, in deciding a case, based itself upon the concept of personality of an international organization and attached to this concept certain kinds of rights. This is all the more significant because the request for an opinion did not mention the concept of international personality, but merely asked whether or not the organization possessed the capacity to bring an international claim for damage caused to the United Nations and to the victim, leaving the Court completely free in its approach to the problem.

The Court itself posed the question whether or not the organization possesses international personality. To answer it, the Court considered 'what characteristics it was intended to give to the organization'. Its method was (a) to verify the presence of certain preconditions and, having done so, (b) to affirm the legal personality of the organization; finally (c) to delimit the extent and degree of this personality, deriving from it the right to present an international claim and certain other rights.

(a) *The preconditions.* The Court found that the Charter: (i) had gone further than creating a mere centre for harmonizing the actions of nations in the attainment of common ends (Article 1, par. 4); but also (ii) had equipped that centre with organs; (iii) had given it special tasks;<sup>1</sup> (iv) had defined the position of the members in relation to the organization, which—in certain respects—occupies a position in detachment from its members.<sup>2</sup>

These four findings the Court seems clearly to have envisaged as necessary preconditions for establishing the existence of the international personality. As to the special tasks or functions, the Court did not single out any particular type as being necessary for the existence of legal personality. On the contrary, it indicated a vast range of activities, by no means exhaustive, which included political, economic, social, cultural and humanitarian functions.

(b) *Consequence: personality.* Taking into account these characteristics the Court arrived at the following conclusions:

It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality . . . (it) . . . can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane . . . what it does mean is that it is a subject of international law and capable of possessing international rights and duties. . . .<sup>3</sup>

<sup>1</sup> Cf. *ibid.*, p. 178.

<sup>2</sup> This, it considered, had been confirmed by practice and by the existence of mutual rights and duties between the members and the organization (particular mention is made of the Convention on Privileges and Immunities of 1946; *ibid.*, pp. 179–80).

<sup>3</sup> *Ibid.*, p. 179.



It is very important to note the objective manner in which the Court proceeded in determining the personality of the organization. The personality could not be implied from the functions; its foundation was not a by-product of functional necessity but a logical relationship between certain presuppositions and certain legal effects. This is so far true that Rouyer-Hameray, author of an important monograph on the implied powers doctrine,<sup>1</sup> who includes this aspect of the opinion of the Court under the implied powers theory, feels at the same time bound to recognize that

... elle fait appel là, semble-t-il, à une notion qu'il convient de distinguer de l'implication telle que nous l'avons définie plus haut. La personnalité internationale n'est pas nécessaire en fonction des buts des Nations Unies en ce sens que ces buts ne pourraient être atteints si l'organisation ne possédait pas cette personnalité. Elle est nécessaire en ce sens que ces buts et ces fonctions ne s'expliqueraient pas si l'Organisation ne la possédait pas.

And he is driven to conclude that

... il ne s'agit pas ici d'une implication véritable ... [et] ... il ne s'agit pas davantage d'une inclusion d'ailleurs.<sup>2</sup>

Taking into account that Rouyer-Hameray divides the line of reasoning of the implied powers doctrine into 'implication and inclusion', the conclusion should be clear that this part of the opinion cannot be taken as based in the 'théorie des compétences implicites'. Its line of reasoning is different.<sup>3</sup>

(c) *Rights arising from personality*. It is from the international personality of this distinct entity, which occupies a position in detachment from its members, that the Court derives the right to present an international claim as the final step of its reasoning. And from it the Court derives not only the right to present an international claim but also other connected rights. As the Court said at the beginning of the opinion, it had to

... consider the characteristics of the Organization so as to determine whether, in general, these characteristics do or do not include for the Organization a right to present an international claim.<sup>4</sup>

<sup>1</sup> *Les Compétences implicites des organisations internationales* (1962).

<sup>2</sup> *Ibid.*, p. 69 (text and n. 4).

<sup>3</sup> The opinion contains a passage which certain writers emphasize so as to conclude that the Court based itself on implied powers arguments when seeking the international personality: 'It is at present the supreme type of international organization and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged'. In the opinion of the present writer it is not right to undermine the reasoning of the Court by transforming a subsidiary and *ad abundantia* argument into an essential one. It cannot be denied that international personality becomes an important instrument for performing the activities of international organizations. But the acknowledgement of this fact must not lead to the conclusion that the proper procedure for finding the international personality of an international organization is to consider whether or not it is implied in its functions.

<sup>4</sup> *I.C.J. Reports*, 1949, p. 177.

As we saw previously, those characteristics led the Court to affirm:

... it is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality ... what it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by international claims.<sup>1</sup>

And further:

... in dealing with the question of law which arises out of Question I (b) it is unnecessary to repeat the considerations which led to an affirmative answer being given to Question I (a). It can now be assumed that the Organization has the capacity to bring a claim on the international plane, to negotiate, to conclude a special agreement and to prosecute a claim before an international tribunal.<sup>2</sup>

Previously the Court had mentioned as related to international claims:

... protest, request for an inquiry, negotiation and request for submission to an arbitral tribunal or to the Court in so far as this may be authorised by the Statute.<sup>3</sup>

These quotations show that it is erroneous to maintain, as Kasme does, that

... en réalité, la Cour après avoir constaté la personnalité de l'Organisation n'a rien tiré de cette constatation. ... Du reste la Cour a bien montré le peu de cas qu'elle a fait de la notion de personne non seulement en n'en tirant aucune conséquence directe, mais en affirmant que c'est là une expression de doctrine.<sup>4</sup>

In an earlier passage Kasme says:

La Cour aurait bien pu se passer de démontrer d'abord la personnalité internationale de l'ONU.<sup>4</sup>

This statement does not, however, appear to be correct. In fact, so far from dispensing with the concept of international personality, the Court expressly had recourse to it and gave to it so decisive an importance as to make it a preliminary step to answering other parts of the request and to deciding whether or not the organization had the capacity to bring an international claim. This appears clearly in the opinion and cannot be disregarded. Thus, the Court observed:

Has the organization *such a nature as involves* the capacity to bring an international claim? *In order to answer this question*, the Court must first enquire whether the Charter has given the Organization such a position that it possesses in regard to its members rights which it is entitled to ask them to respect. *In other words, does the Organization possess international personality?*<sup>5</sup>

(my italics).

Nor did the Court reject the concept of international personality as a derogatory 'doctrinal expression' as Kasme intimates. In fact the Court

<sup>1</sup> Ibid., p. 179.

<sup>2</sup> Ibid., p. 181.

<sup>3</sup> Ibid., p. 177.

<sup>4</sup> Kasme, *La Capacité de l'ONU de conclure des traités* (1960), p. 32.

<sup>5</sup> *I.C.J. Reports*, 1949, p. 178 (my italics).

said: 'This is no doubt a doctrinal expression which has sometimes given rise to controversy. But it will be used here to mean that if the organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its members',<sup>1</sup> thereby emphasizing the precondition of the entity's detachment from its members. That the Court attached to the concept of personality certain legal consequences also appears clearly from the fact that this was what made it necessary for Judge Hackworth to disagree with the Court as to the *reasons* upon which should be based the right of the organization to bring an international claim for reparation in respect of damage caused to the organization. He did not have recourse to the concept of international personality and therefore did not distinguish between the general right to present an international claim and the right to present certain kinds of claims, as the Court did.<sup>2</sup> He upheld both rights by what he considered a proper application of the theory of implied powers, taking issue with its way of reasoning, though agreeing with the Court in its conclusion:

I concur but for different reasons in the conclusion of the Court that the U.N. Organization has the capacity to bring an international claim against the responsible government with a view to obtaining reparation due in respect of damage caused by that government to the Organization. . . . No other conclusion consistent with the specified powers and with the inherent right of self-preservation could possibly be drawn. The Organization must have and does have ample authority to take needful steps for its protection against wrongful acts for which Member States are responsible. Any damage suffered by the Organization by reason of wrongful acts committed against an agent while in the performance of his duties, would likewise be within its competence. This is a proper application of the theory of implied powers.<sup>3</sup>

It would not have been necessary for Judge Hackworth to disagree with the Court on this issue if, as the majority of writers conclude, the Court had based the right to present an international claim on 'the implied powers doctrine' and had not derived it from the personality of the organization.

It is also to be noted that in the opinion of the Court international personality is not a synonym for capacity to present an international claim, as it seems to be for Judge Badawi Pasha when, in his dissenting opinion, he maintains that: 'In stating that the organization has international personality we shall therefore merely have defined its capacity as a subject of law in regard to an international claim. . . .'<sup>4</sup> On the contrary, the Court, before undertaking the task of determining whether or not the characteristics of the organization entailed legal personality, defined this expression as follows: 'It will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.'<sup>4</sup>

<sup>1</sup> *I.C.J. Reports*, 1949, p. 178.

<sup>3</sup> *I.C.J. Reports*, 1949, pp. 196-7.

<sup>2</sup> See below, pp. 130 et seq.

<sup>4</sup> *Ibid.*, p. 205.



Only when objective factors arising out of the Charter has convinced the Court that the organization possessed international legal personality did it attach to this concept 'the capacity to maintain its rights by bringing international claims . . .',<sup>1</sup> ' . . . to negotiate, to conclude a special agreement, etc. . . .'<sup>2</sup> The capacity to bring an international claim and connected rights are therefore in the opinion of the Court not a synonym but one of the *consequences* of the international personality of the organization.

The conclusion can therefore be drawn that the Court, in dealing with the international personality of the organization maintained an objective and material approach. The general characteristics of the rights which, in the opinion of the Court, derive from international personality will be examined in the next part of this article.

## 2. *Rights not derived from personality, but linked with the purposes and functions of the organization*

However, it must be noted that the Court also used arguments which should be labelled as 'implied powers' arguments. The original request to the Court, drafted in the form of two questions, was as follows:

- I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations as an organization the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused
  - (a) to the United Nations
  - (b) to the victim or to the persons entitled through him?
- II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?<sup>3</sup>

Perhaps because in formulating its final opinion<sup>4</sup> the Court largely adhered to the division of issues submitted in the request for an opinion, the writers failed to give sufficient weight to the fact that in dealing with the first question the Court broke completely free from the original drafting of the request. Instead, it subdivided the first question into three parts, and then further subdivided the second part. The three parts were:<sup>5</sup>

- (a) the question whether or not the organization has the right to present an international claim;
- (b) the question of what may be the contents of the claim, that is what rights of reparation may be asserted by the organization through the medium of an international claim (questions I (a) and I (b));
- (c) the question of claims against a non-member of the organization.

<sup>1</sup> Ibid., p. 179.

<sup>2</sup> Ibid., p. 181.

<sup>3</sup> Ibid., p. 175.

<sup>4</sup> Ibid., pp. 187-8.

<sup>5</sup> Ibid., pp. 177-85.

The first was a problem of personality. The second was a problem of legitimacy of the claims in relation to the purposes and functions of the organization. The third was a problem of opposability.

It is the second question which is of interest here. After having found by the reasoning already explained that the organization possesses international legal personality and as a consequence has the right to bring an international claim, the Court stated: 'The next question is whether the sum of the international rights of the organization comprises the right to bring the kind of international claim described in the Request for this Opinion.'<sup>1</sup> Thus, the Court distinguishes *between the right to present an international claim and the right to assert certain rights by means of an international claim*. The former arises from legal personality. The latter is related to functions and implied powers. Is the bringing of a claim of this nature within the functions of the organization? The Court stated:

Whereas a State possesses the totality of international rights and duties recognized by international law, an entity such as the organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.<sup>2</sup>

The Court considered it as almost obvious that the organization might exercise its right of presenting an international claim to demand the reparation of the 'damage caused to the interest of the organization itself, to its administrative machine, to its property and assets and to the interest of which it is the guardian . . .'. And it went on to say:

As the claim is based on the breach of an international obligation on the part of the member held responsible by the organization, the member cannot contend that this obligation is governed by municipal law, and the organization is justified in giving its claim the character of an international claim.<sup>2</sup>

Thus, the Court considered admissible the contents of this claim on two grounds:

- (a) the organization is the immediate holder of the interests which have been violated;
- (b) the claim must be asserted through the right of the organization to present an international claim because the nature of the violated obligation is international (obligation of the members towards the organization).

Clearer and more conclusive arguments regarding implied powers and functions were used by the Court when dealing with the second aspect of the claim, namely, whether the organization is entitled to demand the

<sup>1</sup> *I.C.J. Reports*, 1949, p. 179.

<sup>2</sup> *Ibid.*, p. 180.

payment of the damage caused to the victim or to the persons entitled through him. Or as the Court put it:

The only legal question which remains to be considered is whether, in the course of bringing an international claim of this kind, the organization can recover the reparation due in respect of the damage caused . . . to the victim.<sup>1</sup>

Accordingly, the Court went on to analyse whether among the functions of the organization there is one enabling it to exercise protection in respect of its agents analogous to that exercised by the State upon its nationals.

The Court must therefore begin by inquiring whether the provisions of the Charter concerning the functions of the organization, and the part played by its agents in the performance of those functions, imply for the organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under international law the organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. . . .<sup>2</sup>

. . . to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter. . . . In claiming reparation based on the injury suffered by its agent the organization does not represent the agent, but is asserting its own right, the right to secure respect for the undertakings entered into towards the organization.<sup>3</sup>

Thus, the second conclusion which can be drawn from the opinion of the Court is that along with certain non-expressed rights which arise from the very international personality of an organization, there are other non-expressed rights which can only be inferred from the purposes and functions of each organization.

## PART IV

### THE LEGAL CONSEQUENCES OF PERSONALITY IN INTERNATIONAL LAW

#### 1. *Delimitation of the concept of international personality*

In its *Reparation* opinion the Court expressly warns that to say that an organization is an international person is not tantamount to saying that it is a State or that its rights and duties are the same as those of a State.<sup>4</sup> Nevertheless, in addition to concluding that the juridical personality of the organization enables it to bring an international claim and to exercise other connected rights, the Court uses a more generic expression 'the capacity to operate upon an international plane', denoting a category of

<sup>1</sup> *Ibid.*, p. 181.

<sup>2</sup> *Ibid.*, p. 182.

<sup>3</sup> *Ibid.*, p. 183.

<sup>4</sup> *Ibid.*, p. 179.



rights arising from personality of which the right to present an international claim and other related rights seem to be the species. The Court there observes:

The progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.<sup>1</sup>

It is difficult to see how such a convention could operate except upon the international plane . . . functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. . . .<sup>2</sup>

What does this concept of 'capacity to operate upon an international plane' mean? In what relationship is it to the legal personality of international organizations? Is it a new concept? Here it may be helpful to have recourse to the principles worked out by international law with respect to States. Traditional international law has always linked statehood with a certain range of rights and duties 'which the States customarily enjoy and are subject to simply as international persons'.<sup>3</sup> Among these rights there are the right to a free choice, settlement and alteration of the constitution, the right of self-preservation, the right of commerce, the right to exercise jurisdiction over all persons and things within its territory, the right to enter into international treaties with foreign States, the right to legal equality, the duty of non-intervention, etc.<sup>4</sup> Thus there is a conglomerate of rights and duties which make up the position and legal status of States in the international community. Generally speaking, it is uncommon to find in writers who discuss this question clear distinctions, or statements of general theory, as to which of these rights or duties are essential to or inherent in the legal personality of the State. It is only in an indirect way that one can arrive at certain useful distinctions. The fact that for centuries States were considered the only subjects of international law, and the parallel consideration that a State possessed 'the totality of international rights and duties recognised by international law' did not make it an essential task to draw a clear line between different notions such as for instance statehood, international personality, subject of international law, consequences of the legal concept of international personality. Rights which are a consequence of international personality are very often taken as preconditions of statehood, while rights which are the continuation of certain elements of statehood are considered as deriving from personality,<sup>5</sup>

<sup>1</sup> *I.C.J. Reports*, 1949, p. 118.

<sup>2</sup> *Ibid.*, p. 179.

<sup>3</sup> Cf. Oppenheim, *International Law* (8th ed., 1967), p. 261.

<sup>4</sup> Cf. Phillimore, *Commentaries upon International Law*, pp. 216-19; also Oppenheim, *op. cit.* in the previous note, p. 259; Sibert, *Traité de droit international public* (1951), vol. 1, pp. 230 et seq.; 'Draft Declaration of Rights and Duties of the State', *Yearbook of the International Law Commission* (1949), p. 286; O'Connell, *International Law*, vol. 1, pp. 319 et seq.

<sup>5</sup> Brownlie, *Principles of Public International Law* (1966), pp. 72-3, draws a due distinction between incidents of statehood and legal personality and their existence, pointing out that if by

sometimes giving the impression that every manifestation of the State is either a manifestation of its legal personality or a restriction of it. Many a writer gives a political rather than a legal definition of personality, practically identifying international personality with the general position of States in the international community. To Oppenheim, for example:

... all these qualities constitute as a body the international personality of a State and international personality may therefore be said to be the fact, involved in the very membership of the community of nations that equality, dignity, independence, territorial and personal supremacy and the responsibility of every State are recognized by every other State.<sup>1</sup>

Siotto-Pintor, criticizing this confusion, rightly points out that 'on peut même entendre parler, par des juristes, de restrictions de la personnalité d'un état découlant de conventions par lesquelles cet état s'est simplement engagé à faire ou à ne pas faire quelque chose'.<sup>2</sup> This kind of confusion is to be found in the Montevideo Convention on Right and Duties of States and is, curiously enough, perpetuated by many writers who postulate as one of the legal criteria of statehood the capacity to enter into relations with other States. But this capacity is neither an element of the concept of a State nor a synonym of independence.<sup>3</sup> Fawcett points out that it is really a consequence of statehood,<sup>4</sup> that is to say, a consequence of fulfilling certain criteria which international law requires for States to become international persons. Sovereignty and independence denote the fact that a certain power is supreme within certain territorial boundaries and is not subject to any internal or external power in its decisions.<sup>5</sup> It is a power sovereignty is understood 'the condition where a State has not exercised its own legal capacities in such a way as to create rights, powers, privileges and immunities in respect of other States ... [and] the same ideogram is used as a criterion of statehood then the incidents of statehood and legal personality are once again confused with their existence'.

<sup>1</sup> Oppenheim, *op. cit.* (above, p. 132 n. 3), p. 262. For other writers, however, this is sovereignty rather than international personality. Cf. Waldock, 'General Course on International Law', *Recueil des cours* (1962—II), p. 157, for whom 'sovereignty in the international law of today expresses simply the totality of the powers and rights which every independent State claims in virtue of its statehood and in its relations with other States'.

<sup>2</sup> 'Les sujets de droit international autres que les états', *Recueil des cours* (1932—III), p. 283. He expressly quotes the decision of the Central American Court in the case concerning the Nicaragua Canal, between Nicaragua and Costa Rica, in which the Court stated that 'pour tout ce qui se rapporte au Canal la souveraineté du Nicaragua est limitée par les conventions passées avec les républiques voisines, lesquels actes modifient nécessairement sa personnalité et la restreignent dans les limites prescrites par des engagements solennels'.

<sup>3</sup> Cf. against, Brownlie, *op. cit.* (above, p. 112 n. 2), p. 68.

<sup>4</sup> Fawcett, *The British Commonwealth in International Law* (1963), p. 92. See also Waldock, *loc. cit.* (n. 1 on this page), p. 147, who rightly does not include within the legal criteria of statehood the 'capacity to enter into relations with other States'. He gives four criteria as 'generally agreed' to be laid down by international law for the existence of an international State:

1. a permanent population politically organised in the same community;
2. a territory reasonably well defined;
3. a governmental authority effectively exercising the function of government;
4. independence of external control by another State.

<sup>5</sup> Fauchille, *Traité de droit international public*, vol. 1, p. 306.

which finds its source in itself. Once a political entity consists of a population within a defined territory, ruled by a government which exercises a sovereign and independent power, this entity becomes a person in international law and as such enjoys the capacity to enter into legal relationship with other international persons. This capacity to enter into relationship with other subjects of international law is considered by many writers as an inherent feature of personality.

In spite of the broad definition of international personality, quoted above, which Oppenheim gives when dealing with the right of States to enter into relations, the traditionally called right of intercourse, he gives to this right a very special position:

There is in law no such fundamental right of intercourse. All the consequences which are said to follow from the right of intercourse are not at all consequences of a right but nothing else than consequences of the fact that intercourse between the States is a condition without which a law of nations would not and could not exist. Intercourse is therefore one of the characteristics of the position of the States in the community of nations. To that extent it may be maintained that intercourse is a presupposition of the international personality of every State.<sup>1</sup>

And in another passage:

Intercourse being a presupposition of international personality, the law of Nations favours intercourse in every way.<sup>2</sup>

One may disagree with Oppenheim's characterization of intercourse between subjects of international law as a presupposition of international personality, but what is really important is the special link he establishes between the possibility of entering into relations and legal personality in international law. He distinguishes between intercourse as such and the various matters which intercourse may involve:

It is because such special rights of intercourse do not exist that the States conclude treaties regarding matters of post, telegraphs, telephones, railways and commerce.<sup>1</sup>

As manifestations of intercourse Oppenheim cites the institutions of legations and consulates, international transactions such as negotiations, congresses and conferences, declarations, notifications, protests, renunciations and treaties.<sup>3</sup>

The existence of protectorates placed writers under a need to define in a more precise way the features inherent in legal personality in international

<sup>1</sup> Oppenheim, *op. cit.* (above, p. 132 n. 3), p. 321.

<sup>2</sup> *Ibid.*, p. 124.

<sup>3</sup> *Ibid.*, pp. 324 and 868-903. See, for instance, his definition of negotiation: 'International negotiation is the term for such intercourse between two or more States as is initiated and directed, for the purpose of effecting an understanding between them or settling a dispute' (p. 867). In Oppenheim, however, intercourse or relationship between States is a mixture of material and legal concept. For instance, he also cites as manifestations of intercourse the freedom of the open sea and the freedom of navigation (*cf.* p. 325).



law. They pick out some of the rights traditionally attached to statehood to test whether or not a protected State retains its international personality. Phillimore, for instance, differentiates between a State under the protectorate of another yet retaining its international personality and a State under protectorate which forfeits its international personality.<sup>1</sup> Thus, he distinguishes the concept of statehood from that of international person. And he further traces the *fundamentum divisionis* in the following terms:

The proper and strict test to apply will be the capacity of the protected State to negotiate, to make peace or war with other States, independently of the will of its protector. . . . States which cannot stand this test, which cannot negotiate, nor declare peace or war with another country without the consent of their protector, are only mediately and in a subordinate degree considered as subjects of international law.<sup>2</sup>

There again it is the capacity to enter into relationship which is considered as the keystone of personality.

Lachs, in a study of multilateral treaties, affirms that: 'La définition classique des droits de l'état embrasse bien, à côté du *jus legationum* et du *jus belli ac pacis*, le *jus foederum ac tractatum*.'<sup>3</sup> Surely enough, these are not the only rights of the State, but it is interesting to note that they are selected as a special category and Lachs further draws the distinction between *la capacité juridique* and *la capacité aux actes juridiques* of States:

L'état signifie ici le sujet de droit international. Chacun d'eux possède la capacité juridique ainsi que la capacité aux actes juridiques.<sup>3</sup>

Fitzmaurice, basing himself on the *U.S. Nationals in Morocco* case, as well as on the *Reparation* case, draws the conclusion that:

. . . the necessary attribute of international personality is the power to enter, directly or mediately, into relationship (by treaty or otherwise) with other international persons.<sup>4</sup>

Kelsen, on the other hand, gives a very concise and precise delimitation of the consequences of personality:

Juridical personality means the capacity of being a subject of legal duties and legal rights, of performing legal transactions and of suing and being sued at law.<sup>5</sup>

<sup>1</sup> Phillimore, *op. cit.* (above, p. 132 n. 4), vol. 1, p. 94.

<sup>2</sup> *Ibid.*, p. 97.

<sup>3</sup> Lachs, 'Le développement et les fonctions des traités multilatéraux', *Recueil des cours* (1957—II), vol. 92, p. 17.

<sup>4</sup> Fitzmaurice, 'The Law and Procedure of the I.C.J.', this *Year Book*, 30 (1953), p. 2. In the *U.S. Nationals in Morocco* case, the I.C.J. (*Reports*, 1952, p. 188) maintained that Morocco kept its international personality even if France took charge, in principle, of all the international relations of Morocco. This seems to be somewhat different from Phillimore's assertion (see above, text), but the Court here was distinguishing protected States from other territorial entities such as colonies and pointed out the fact that this sort of entities are prevented from entering into international relationships even through the expedient of another State, because the created legal relations would fall upon the latter. On the contrary a protected State can enter into relationship with other subjects through the agency of the protecting State (Fitzmaurice, *loc. cit.* in the preceding note, p. 3). See also Sereni, 'La Représentation en droit international', *Recueil des cours* (1948—II), vol. 73, pp. 109—10.

<sup>5</sup> Kelsen, *op. cit.* (above, p. 114 n. 5), p. 329.

In conclusion it seems legitimate to infer that among those rights which have been traditionally attached to the international personality of the State, a further distinction is to be found underlying the opinions of the writers cited. On the one hand, there are those rights which are the projection of the idea of personality into the international plane and enable the person to manifest itself as a distinct entity endowed with its own will *vis-à-vis* other subjects entering into legal relationships with them; and, on the other, there are those rights which owing to the special characteristics of the given person, or to political or philosophical concepts, are attributed to a subject of law. Thus, in its broad sense international personality would be practically synonymous with the legal position particular to each subject of law; but in its narrower and stricter sense it would only denote the above described status of a certain category of rights. In this latter sense the right of the State to conclude treaties, for instance, derives directly from its international personality; but the right to independence,<sup>1</sup> the right to equality in law with every other subject, the right to exercise jurisdiction over its own territory, the right to acquire territory by means accepted by international law, etc.<sup>2</sup> derive from specific characteristics which constitute the specific political and social foundations of this particular subject, a State.<sup>3</sup> Summing up, it is considered necessary to distinguish the following:

- (a) legal criteria of statehood;
- (b) statehood;
- (c) international personality;
- (d) rights and duties of the State which find their basis either in personality itself or in statehood.

(a) There exist political entities consisting of a population living within a defined territory which are endowed with the supreme power within its boundaries to be exercised by members of that population (internal sovereignty and government), and which are not externally dependent (external sovereignty or independence).

(b) Once a political entity fulfils these conditions, it is a State. Its existence is a matter of fact.<sup>4</sup> It is in this sense that Article 3 of the Convention on Rights and Duties of States (Montevideo, 1933) and Article 9 of the

<sup>1</sup> The right to independence, for instance, is indeed the right to continue to be independent, that is to say the right to keep one of the elements of statehood.

<sup>2</sup> See Arts. 1, 2, 5, 11 and 12 of the Draft Declaration of Rights and Duties of the State.

<sup>3</sup> This derivation of rights and duties from elements of statehood or the position of States in the international community is common to many writers, although they do not always draw the distinction here suggested. See, *inter alia*, Phillimore, *op. cit.* (above, p. 132 n. 4), p. 184; Sibert, *Traité de droit international public* (1951), vol. 1, p. 230.

<sup>4</sup> Even if the birth of a given State is accompanied by a treaty, this normally does no more than accept the existence of those facts.

Organization of American States Charter provide: 'The existence of the State is independent of its recognition by other States.'

(c) Personality is a legal concept. The international legal order 'recognizes' these factual presuppositions as qualifying for the capacity to enjoy international rights and duties and be considered a distinct entity able to create and extinguish legal relations within that legal order.

(d) In a broad sense all rights and duties of the State 'derive' from international personality; but logically this can mean only that international personality enables the State to be the direct subject of those rights and duties. In a deeper and more precise sense only some of these rights find their source in the international personality of the entity; the foundation of the remainder is not personality itself but the particular preconditions which transform a certain entity into a State, namely statehood itself and its political conception. It is therefore necessary to distinguish, on the one hand, personality as a presupposition or condition enabling a State to be a subject of international law holding international rights and duties on whatever basis and, on the other, personality as a source of certain international rights and duties which are a projection of the notion of a person into the international plane, enabling the person to manifest itself as a distinct entity endowed with its own will *vis-à-vis* other international persons, entering into relationship with them, creating, modifying, conserving or extinguishing international legal relations.<sup>1</sup>

Therefore, the present writer considers that the distinction drawn by Siotto-Pintor between subjects and persons in international law is plausible, but he does not entirely endorse his criterion of distinction. To Siotto-Pintor, 'subject' is 'le destinataire de normes juridiques' while 'person' is 'la possibilité juridique générale d'être titulaire de n'importe quel droit et de n'importe quelle obligation appartenant à un domaine juridique donné'.<sup>2</sup>

<sup>1</sup> This explains why writers who maintain a declaratory point of view of recognition accept nevertheless its constitutive effect on certain other rights. Cf. Brownlie, *op. cit.* (above, p. 112 n. 2), p. 84, who writes: 'The act of recognition is a condition of the establishment of formal, optional and bilateral relations, including diplomatic relations and the conclusion of treaties'. Cf. also Brownlie, *ibid.*, n. 3, and Jiménez de Aréchaga, *op. cit.* (above, p. 113 n. 4), vol. 2, p. 314. Thus there are for the States rights arising from their recognition as international persons and rights not arising from but previous to that recognition. See also in this respect the distinction which arises from Articles 9 and 10 of the O.A.S. Charter (taken partly from the Montevideo Convention on Rights and Duties of the State) which provide:

'The political existence of the State is independent of its recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other states in accordance with international law (Art. 9).

'Recognition implies that the State granting it accepts the personality of the new State with all the rights and duties that international law prescribes for the two States (Art. 10).'

It is submitted that the rights arising from recognition are those arising from international personality as described in the text and below, pp. 139-40.

<sup>2</sup> *Loc. cit.* (above, p. 133 n. 2), pp. 278 and 279.



However, 'subjects' of international law seem to be holders or bearers of at least one international right or duty. In this sense, individuals, belligerent and insurgent communities, non-governmental organizations and the like are subjects of law along with States and intergovernmental organizations. International persons are those subjects which enjoy without restriction the rights concerning the capacity to enter into relationship and operate on an international plane as distinct entities.<sup>1</sup>

What has been said about the rights and duties of the State and their different foundation also makes it possible to reject the often stated doctrinal proposition that 'the State possesses the totality of international rights and duties recognized by international law'.<sup>2</sup> This inaccurate expression, which became widespread since it was used by the Court in the *Reparation* case, is redolent of the old orthodoxy that accepted only States as subjects of international law. Today it seems almost obvious that, for instance, individuals are holders of rights on the international plane which States by their very nature cannot enjoy. Thus, when the whole matter of the protection of human rights is projected on to the international plane by regional conventions or world covenants,<sup>3</sup> the individual acquires international rights and duties which only he enjoys and which respond to his own nature as a subject of the law; and these rights and duties are as international as, for example, the right and duty of the State of non-intervention which do not attach to the individual by reason of his particular nature. Once subjects other than States entered the international legal order, the inescapable consequence has been that some international norms should be directed only towards them, creating rights and duties arising from their particular structure or special nature.<sup>4</sup> The same applies to international organizations. For instance, their right to fulfil implied functions or exercise implied powers in addition to those expressly

<sup>1</sup> Some subjects may also exceptionally be granted some of these rights but not as a matter of principle. Cf. Jiménez de Aréchaga for a list of instances in which the individual has been awarded capacity to bring an international claim: *op. cit.* (above, p. 113 n. 4), pp. 263 et seq. Also, Brownlie, *op. cit.* (above, p. 112 n. 2), p. 466, and *ibid.*, p. 58, regarding the possible treaty-making capacity of belligerent communities.

<sup>2</sup> Cf. *I.C.J. Reports*, 1949, p. 180.

<sup>3</sup> i.e. European Convention on Human Rights; United Nations Covenants on Human Rights.

<sup>4</sup> As the Court itself put it at the beginning of the *Reparation* case: 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.'

This seems to be somewhat contradictory to the assertion that 'the States possesses the totality of international rights and duties recognized by international law'. Indeed, it is submitted that what the Court meant by this assertion is that States may act on an international plane on the whole subject-matter internationally available, with no limitations as to the *object* upon which their international legal relations may devolve, and with no functional limitation (see below, pp. 140-4). The word 'object' is here used in the sense in which Schwarzenberger uses it; cf. *International Law*, vol. 1, pp. 289-418.

The question whether or not the subjects other than States are full international persons with capacity to act upon an international plane is quite different.

provided in their constitutions (a right repeatedly recognized by international tribunals<sup>1</sup>) is an international right which arises from the particular functional nature of the organizations and their need to fulfil those functions and purposes which have been expressly provided. This right is not, as such, enjoyed by States. Similarly, some international rights which apparently have been transferred from the sphere of one subject of the law to that of another may have such a different foundation in the particular nature of each subject that they may, in fact, be said to be different and unrelated international rights.<sup>2</sup>

## 2. *International organizations as international persons*

What has been said about the international personality of the State and the different sources of its rights and duties explains why in the *Reparation* case, while stating that an organization fulfilling certain objective criteria enjoys international personality and, as such, certain kinds of rights and duties, the Court nevertheless pointed out that this was not tantamount to saying that the organization was a State or that its rights and duties were the same as those of a State. From the personality of an organization, as from that of a State, arise only those rights and duties which find their source in personality itself—like those mentioned by the Court in relation to the circumstances of that case: the rights to bring a claim, to negotiate, to conclude a special agreement, protest, request for an inquiry, etc. The rights arising from personality constitute in their totality ‘capacity to operate upon an international plane’.

The general category of those rights may be formulated as follows:

(a) The right to express its will through the different legal ways found in the international order for producing legal effects on the international plane. This right constitutes the capacity of international organizations to perform international acts, understanding by these the different legal ways of manifesting the will of the organization, which manifestation is capable of producing particular legal effects and aims at creating, modifying, conserving or extinguishing international legal relations.<sup>3</sup> Thus, international organizations may perform bilateral acts (treaties)<sup>4</sup> and unilateral

<sup>1</sup> Cf. below, pp. 147–53; and above, pp. 121–3.

<sup>2</sup> Thus, the right of the State to exercise the diplomatic protection over its nationals abroad and the right of intergovernmental organizations to present an international claim on behalf of their employees (see foundation of the latter, *I.C.J. Reports*, 1949, pp. 183 et seq.).

<sup>3</sup> Cf. Suy, *Les Actes juridiques unilatéraux en droit international public* (1962), p. 22, who defines the international act as follows: ‘Une manifestation de volonté contractuelle ou unilatérale, imputée à un ou plusieurs sujets de droit international et à laquelle une norme de cet ordre juridique rattache des conséquences correspondantes à la volonté.’

<sup>4</sup> The Court, in the *Reparation* case, seems to have expressly recognized the capacity to conclude treaties as one of the necessary manifestations of the capacity of international organizations to operate upon an international plane. Thus, it mentions, *inter alia*, the conclusion of conventions as one of the elements which manifest the organization’s position of detachment



acts, whatever their form, as, for example, promise, notification, recognition, renunciation or claim.<sup>1</sup>

What has been said, naturally, covers the different stages of the performance of the acts, e.g. participation in, or convening of, an international conference as a previous step to the conclusion of a treaty.<sup>2</sup>

(b) Rights which enable the organization to manifest itself as a distinct entity and make possible relations with other international persons. Within this group are to be included: active and passive *jus legationis*; recognition of other subjects of international law and their governments; and the right to use distinctive signs, flags, etc.<sup>3</sup>

But as far as the performance of international acts is concerned, some further explanation is still required. As a consequence of their position in the international sphere as original subjects of international law, it is a customary right of States to apply their international activity to every field or subject-matter not actually unlawful in the international order. This, in part, is what writers mean by the statement that 'States possess the totality of international rights and duties recognized by international law'. This is also what Lachs means when he says that in addition to 'la capacité aux actes juridiques', States also possess 'la capacité juridique'.<sup>4</sup> Thus, to give a few examples, States may exploit resources of the ocean, tend submarine cables, establish a fishing fleet, undertake the discovery of new territories or the conquest of space, take measures to stamp out diseases, furnish technical assistance to other countries, develop their international trade. All this they may do as a matter of principle and without any kind of

from its members (pp. 178-9). Moreover, after having found the international personality of the organization and its capacity to operate upon an international plane the Court states: 'The risk of competition between the organization and the national State can be reduced or eliminated either by a general convention or by agreements entered into in each particular case' (p. 186). (Cf. also Chiú, *The Capacity of International Organizations to Conclude Treaties* . . . (1966), p. 39.) After having verified the international personality of the organization and its capacity to operate upon an international plane, the Court also stated: 'It can now be assumed that the organization has the capacity to bring a claim on the international plane, to negotiate, to conclude a special agreement' . . . etc. (p. 181). Cf. also above, p. 127.

<sup>1</sup> For a classification of unilateral acts in international law see Suy, *ibid.*, pp. 25 et seq.; and also Rousseau, *Principes généraux de droit international public* (1944), vol. 1, pp. 126 et seq.

<sup>2</sup> It is necessary to distinguish the right to conclude treaties in the name of the organization, which arises from its personality, from the possible expressed or implied function of preparing conventions or draft agreements upon certain matters to be opened for signature by member or non-member States as is usually done, for instance, by the U.N. or the I.C.O. on their behalf, or the conclusion of agreements in the name of the member States. In both the latter instances the organization is not a party and no legal effects devolve upon it. Cf. Detter, *op. cit.* (above, p. 114 n. 2), pp. 155-77, who rightly points out: 'For the conclusion of agreement on behalf of States the possession of international personality or of any other particular quality is unnecessary: States are not limited in their choice of mandatories; they may even choose a private person for this task [p. 166]'. Cf., also, Bowett, *The Law of International Institutions*, p. 280. Likewise the right to act as a depositary of a treaty arises from its personality when the organization exercises its own treaty-making power and is a party to the treaty; in other cases it becomes an expressed or implied function.

<sup>3</sup> See, on this issue, Detter, *op. cit.* (above, p. 113 n. 2), p. 115.

<sup>4</sup> Cf. above, p. 135.



limitation, whether these activities should be considered primary and essential or secondary and subsidiary, because the State itself fixes its ends and the means to carry them out.<sup>1</sup> By contrast, international organizations are bound to pursue some of these activities as purposes or aims and others as means to carry out the former. The latter constitute their functions or powers. International organizations cannot undertake purposes other than those established in their constituent documents, nor convert functional means into purposes, nor perform functions or exercise powers other than those provided in their constitutions unless they are to be implied through the link of necessity.<sup>2</sup> They have a complete 'capacité aux actes juridiques' but their 'capacité juridique' depends upon their purposes and functions. They are bound by a principle of functional limitation. As the Court has put it:

Whereas a State possesses the totality of international rights and duties recognised by international law an entity such as the organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.<sup>3</sup>

And again:

These purposes are broad indeed but neither they nor the powers conferred to effectuate them are unlimited.<sup>4</sup>

Similarly, the Permanent Court of International Justice stated in the *European Commission of the Danube* case:

As the European Commission is not a State but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose.<sup>5</sup>

This essential difference between States and international organizations makes it necessary to bear in mind that the statement that from the international personality of an organization arises the right to perform international acts is to be understood in the restrictive technical sense already explained. This is the only concept of international act which does not collide with the principles of functional limitation or with the doctrine of implied powers.<sup>6</sup> Since States are not limited by purposes or functions or

<sup>1</sup> The restrictions of the right of the State to wage war began precisely by applying the relationship means-end. The Briand-Kellogg pact forbade war as an 'instrument of national policy'.

<sup>2</sup> See below, pp. 151-2, and above, pp. 121-2, 129-31.

<sup>3</sup> *I.C.J. Reports*, 1949, p. 180.

<sup>4</sup> *Ibid.*, 1962, p. 167.

<sup>5</sup> *P.C.I.J.*, Ser. B, N. 14, p. 64.

<sup>6</sup> In the matter of treaties, for instance, the restrictive doctrine fears the possibility that through the conclusion of treaties an organization may fulfill functions outside the framework of the constitutional document. See Kelsen, *The Law of the United Nations* (1957), p. 330. Even treaties which specifically declare the international personality of an organization provide special articles for certain agreements to avoid problems of incompatibility (see Art. 210 and Art. 228, E.E.C.).

Cf. also Socini, *Gli accordi internazionali delle organizzazioni intergovernative* (1962), who writes: 'If on some occasion . . . the validity of some agreements has been contested, it was on

fields of activity, the concept of international act as it concerns the States has very often embodied not only the aptitude of the act to produce legal effects but also the content of the rights and duties so acquired and the activities connected with them. For instance, the 'act of occupation' implies a unilateral manifestation of will directed towards the acquisition of territory and linked with a sector of the activity of the State. The same could be said of the act of 'declaration of war', etc. It has not always been felt necessary to draw in every case a rigorous distinction between the act and its subject-matter, because no question of lawfulness was at stake. In other instances it is even possible to find the denomination of act or international act being given to the simple exercise by the State of one of its international rights<sup>1</sup> or even the undertaking of a material activity: for instance, the act of fishing in the high seas or the act of patrolling coastal waters. These are non-technical ways of using the word act. When dealing with the law of

political grounds rather than legal ones, maintaining that the competence limits of an organization had been exceeded.'

Cf. further Dupuy, 'Le droit des relations entre les organisations internationales', *Recueil des cours* (1960—II), who maintains that: 'dans l'ordre des relations extérieures la règle de la spécialité interdit donc aux organisations de passer des accords qui aboutiraient à modifier leurs compétences' (p. 534). And in an earlier passage: 'Ainsi les organisations concluent des accords mais comme le dit M. Gerald Fitzmaurice, elles ne jouissent de cette faculté qu'à l'égard des questions relevant de leurs attributions et de leurs compétences: elles sont soumises aux limitations résultant de leur constitution' (p. 533).

That is also why Schneider, as a conclusion to his book, *Treaty-making Power of International Organizations* (1959), states on p. 135: 'A rule about the treaty-making power and the applicability of treaty law to the practice of organizations may be tentatively stated as follows: organizations may conclude agreements with all those entities which international law recognises to be capable of being parties to agreements provided organizations do not exceed the scope and limits of their competences in concluding such agreements. The extent of treaty-making power is thus restricted to the extent of competences. This link between competence on the one hand and treaty-making power on the other *is not a specific one but generally applies to other capacities of organizations*' (italics added).

Therefore, the question is not posed in its real terms when Chiú deals with the problem of the capacity of international organizations to conclude treaties as one of the four techniques they possess 'if it is necessary for [them] to acquire certain rights or assume duties or new functions not provided in [their] constitution' (p. 1). 'The fourth technique is for the international organization to conclude treaties with States or other entities concerned. . . . However this technique raises an important question of international law since, under traditional theory, only States can be parties to international treaties' (p. 2). Cf. Chiú, *op. cit.* (above, pp. 139-40 n. 4).

Indeed, whatever the legal basis of the treaty-making power may be, it may never become a basis for acquiring new functions not provided in the constitution. Some other legal foundation must exist for non-expressed functions (implied powers, extensive interpretation, etc.) which will be exercised by means of a treaty.

Accordingly we cannot share Kelsen's view that if the Charter had expressly recognized the international personality of the U.N. 'the Organization would have the power to conclude any treaty whatever, especially treaties by which the Organization accepts functions not conferred upon it by the Charter' (cf. Kelsen, *op. cit.* (above, p. 114 n. 5), p. 330).

<sup>1</sup> See, for instance, Brownlie, *op. cit.* (above, p. 112 n. 2), pp. 522 et seq., who under the heading 'Performance of Acts in the Law' includes the following sub-items: (a) the treaty-making power; (b) privileges and immunities; (c) capacity to espouse international claims; (d) functional protection of agents and persons entitled through them; (e) *locus standi* in international tribunals; (f) responsibility; (g) administration of territory; (h) right of mission; (i) recognition of States.



international organizations the distinction is, however, indispensable; whereas a State is in a position in which it can manifest its will on an international plane upon the totality of the subject-matters recognized as lawful by international law, creating, modifying, claiming or extinguishing legal relations upon those subject-matters, international organizations may do the same only upon those which have been expressly or impliedly granted to them by the States concerned under the form of functions or powers. In consequence, there may be considered 'inherent' in the personality of an international organization a capacity to manifest its will *vis-à-vis* other subjects of international law, by means of a treaty, or a recognition or a claim; but the application of that will, for example to the creation of armed forces,<sup>1</sup> or the administration of territory, or the acquisition of territory by occupation, or the use of the high seas by a fleet,<sup>2</sup> or the participation in activities of other international organizations,<sup>3</sup> is not 'inherent' in its personality but pertains to the scope of its expressed or implied functions or powers. Member States bound by a majority decision must, therefore, have the right—without withdrawing from the organization—to contest the validity of activities, whether inessential or unnecessary, or constituting the adoption of new purposes, which are not expressly provided for by the constitution as functions or powers.<sup>4</sup>

If a proper distinction is made between functions and rights arising from personality it does not seem appropriate to speak of 'a restricted international personality' or of a 'principle of specialization' regarding that

<sup>1</sup> This function is different from the right for States to wage war (*'jus belli ac pacis'*) recognized by customary international law and listed by writers as one of those which integrate the category of rights arising from international personality (see above, p. 135). Indeed this right does not exist any longer. The whole question of the use of force has been radically changed from a legal point of view by the Charter of the United Nations. What was a right of the States has been transformed into a function of the international community to keep the international peace and security. As to self-defence, it continues to be a right of the States to act individually or collectively in their own or mutual defence. But as far as international organizations are concerned, it is not possible to accept Seyersted's assertion that they enjoy a right of self-defence arising from their personality ('organization's inherent right of collective self-defence', Seyersted, *Objective International Personality* . . . (1963), p. 13). Indeed, the right is inherent to members who may use an organization for institutionalizing their collective self-defence. In this case, self-defence becomes a function of the organization (U.N.) or even its purpose (Rio Treaty; N.A.T.O.).

<sup>2</sup> Cf. *Yearbook of the International Law Commission* (1956), p. 102. Supplementary report by J. P. A. François on the right of international organizations to sail vessels under their flags: 'No doubt can exist regarding the question whether the U.N. has or not the right to own ships. The organization certainly has that right, since otherwise in the words of the International Court, it may not be in a position to "effectively discharge its functions".'

<sup>3</sup> All these are activities justified by Seyersted as deriving from international personality, placing organizations in a position in which they can perform practically all activities provided they are directed towards the purposes of the organization, with no kind of control—not even by member States (see above, pp. 119–21).

<sup>4</sup> This distinction between acts, purposes and functions or powers arises clearly from Art. 16 of the F.A.O. Constitutive Charter which under the heading 'legal status' provides: 'The organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this constitution.'



personality, as some writers do. The principle of functional limitation has no influence on the extent of the personality.<sup>1</sup>

### 3. *The preconditions of personality in international organizations*

As in the case of States, to affirm that a certain international entity enjoys international personality leads to the need to define the legal criteria which typify those entities known as international organizations. Common patterns of international practice, common elements found in the constituent instruments, the views stated by the Court, mainly in the *Reparations* case, and considerations of legal logic which prescribe that equal situations should produce equal legal effects, make it possible to establish certain objective criteria or preconditions which typify the category and constitute the substratum to which the international legal order ascribes personality. The Court itself, when dealing with the international personality of the United Nations, laid the foundation of a general application of its conclusions by stating:

Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.<sup>2</sup>

In the words of the Court the establishment of the United Nations was the 'culmination' of this development<sup>2</sup> and by no means an isolated exception.

As in the case of the State, it is necessary when considering those legal criteria to be careful not to make a confusion between the preconditions of personality and its legal consequences. Taking into account the elements of judgment already mentioned those preconditions may be formulated as follows:

An international agreement creating an association of States; endowed with at least one organ which expresses a will detached from that of the member States; and possessing defined aims or purposes to be attained through the fulfilment of functions or powers.

These preconditions call for the following comments:<sup>3</sup>

Unlike in the case of States where the preconditions of personality are mainly factual, in the case of international personality the preconditions are mainly legal elements. This is so because at the basis of every international organization there is always an expressed or tacit agreement,

<sup>1</sup> Cf. against Waldock, loc. cit. (above, p. 133 n. 1), p. 142, who writes: 'the functions and powers of an organization and in consequence the extent of its international personality and capacity are defined and controlled by the terms of its constituent treaty'.

<sup>2</sup> *I.C.J. Reports*, 1949, p. 178.

<sup>3</sup> See generally: Reuter, *The Law of International Institutions* (1958), pp. 214-18; Seyersted, *Objective International Personality* . . . (1964), pp. 46-67; Sereni, *Diritto internazionale*, vol. 2: *E organizzazioni internazionali* (1960), pp. 801-52.

normally between States, to create and maintain the institution. It does not seem to be essential that the agreement should be formal or according to the formalities of an international treaty. Parallel resolutions of States followed by acts which undoubtedly show the intention of creating an international organization may suffice. What does seem essential is that those acts leading to the establishment of an international organization must be performed by the organs charged with the international relations of the State competent to bind the State internationally and to delegate functions and powers to the organization to be exercised by the latter upon its members.<sup>1</sup>

Within the concept of association is comprised the notion of permanence without which no institution would exist, only a simple conference or congress.<sup>2</sup>

Practice shows that international organizations are constituted primarily by States, and that States are an element essential to the definition of the organization as an international person; nevertheless membership may sometimes be open to certain entities which are not States.<sup>3</sup>

The second element is the keystone of personality. It is the existence of organs which makes it possible to distinguish international organizations from other looser associations of States like, for example, the British Commonwealth.<sup>4</sup> This organ must express a will of its own detached from that of the member States.<sup>5</sup> This is a distinctive feature which does not

<sup>1</sup> This precludes the Nordic Council from being considered as an international organization, with international personality in the sense used in this paper, since it has been established in 1952 by parallel resolutions of the parliaments of the original members, Denmark, Iceland, Norway and Sweden. As Sereni writes, 'the lack of a solid institutional basis and of powers upon its members lead to the denial of its international legal personality' (ibid., p. 1218). Cf., against, Seyersted, *op. cit.* in the preceding note, p. 51, who writes that 'it is not part of the criteria listed above that the organization is constituted by, and composed of representatives of any particular organs of the member States'. But according to his own criterion ('organs established by two or more sovereign States' (p. 47)) the real question is to what extent organs created only by resolutions of parliament can be considered in the international plane as really having been 'established' by the States.

<sup>2</sup> Cf. Reuter, *The Law of International Institutions* (1958), p. 215, who writes: 'the permanent nature of the organization is a measure of its independence; if it is not permanent it can only act in accordance with the will of the member States; if it is permanent it can stand up to the States'.

<sup>3</sup> Cf. Reuter, *Institutions internationales* (1967), pp. 193-4, particularly the possible membership of certain territorial entities like provinces, overseas territories, etc., accepted by certain technical organizations like the I.T.V., the U.P.U. and the W.H.O.

<sup>4</sup> See Brownlie, *op. cit.* (above, p. 112 n. 2), p. 521.

<sup>5</sup> Cf. Waldock, *loc. cit.* (above, p. 133 n. 1), p. 140, who, commenting on the *Reparation* case and the Court's reasoning, affirms: 'international personality is to be attributed to an organization when it has been created as an autonomous entity detached in some measure from the individual member States which compose it.' But he further writes: 'this is so when . . . (c) possession of international personality is necessary to the effective discharge of those functions'. For the reasons already stated (see above, pp. 125-6) we do not believe the Court used a criterion of 'functional necessity' in stating the international personality of the United Nations. The Court in the *Reparation* case gave the following indicia as defining the position of members in relation to the organization and thereby creating a position of detachment: 'The Charter requires the

exist in those cases in which the States undertake a reciprocal collaboration through the medium of a 'common organ' whose manifestations of will are attributed simultaneously and identically to all the States to which the organ is common.<sup>1</sup> This concept of 'common organ' was the early explanation given by writers like Anzilotti,<sup>2</sup> to the incipient appearance of international institutions disregarding the possible existence of a will distinct from that of the member States, and it may still continue to be applied to international conferences or to certain early stages of a future international organization when States create certain administrative or secretarial offices of a permanent character charged with tasks of documentation or preparation.<sup>3</sup>

In order to detect the existence of a will detached from that of the member States, different elements may be helpful. The existence of a power of decision governed by a majority vote is a clear indication of that separate will. But even under the rule of unanimity,<sup>4</sup> the assumption by the member States of certain basic obligations to carry out substantive objectives by means of the decision power of the created international organs,<sup>5</sup> or, as Kelsen says, 'the competence [of the organs of the organization] to exercise certain functions in relation to the members',<sup>6</sup> are also indicators of a detached and non-common organ.<sup>7</sup>

On the purposes, functions and powers some comments have already been made and some further explanation will follow. Yet, it is necessary

members to give the organization every assistance in any action undertaken by it. It requires the members to accept and carry out the decisions of the Security Council and authorizes the General Assembly to make recommendations to the members. It gives the Organization legal capacity and privileges and immunities in the territory of each of its members. It provides for the conclusion of agreements between the organization and its members.

<sup>1</sup> Sereni, *op. cit.* (above, p. 118 n. 1), p. 784.

<sup>2</sup> Cf. 'Gli organi comuni nella società di stati', *Rivista di diritto internazionale*, 8 (1914), pp. 156-64.

<sup>3</sup> A good recent example of this may be found in the 'Intergovernmental Committee of Coordination' created by the Joint Declaration of the Ministers of Foreign Affairs of the River Plate countries (Argentina, Brazil, Bolivia, Paraguay and Uruguay) with a view to the future institutionalization of the River Plate Basin Development Program (Declaration of 16 February 1967).

<sup>4</sup> See Reuter, *op. cit.* (above, p. 145 n. 2) who writes: '... in law, if the organization has jurisdiction then its decisions, even when taken unanimously by the member States, have the immediate force of law and bind the States as decisions and not as agreements subject to national conditions of constitutional validity'.

<sup>5</sup> Member States bind themselves to participate in the work of the organization. The existence of a right of withdrawal even without previous notice does not seem to impair the existence of this obligation (as Seyersted suggests in *op. cit.* (above, p. 144 n. 3), p. 50).

<sup>6</sup> Cf. Kelsen, *op. cit.* (above, p. 114 n. 5), p. 329.

<sup>7</sup> Conforti, *La funzione dell'accordo nel sistema delle Nazioni Unite* (1968), gives a very clear example of an unanimous decision which is not an agreement but an organic act; this happens when its validity does not depend on the unanimity of the decision but on the accordance of the latter with the Charter of an organization. Thus Arts. 173 and 146 of the E.E.C. and EURATOM treaties respectively provide that unanimous decisions of the Council of Ministers may be brought before the Court for revision by any of the States which concurred in the making of the decision (p. 10, text and n. 22).



to stress that these constitute pre-conditions of international personality and not manifestations or legal consequences arising out of it.

It may now be considered to be customary international law that every time States create an organization fulfilling those objective preconditions they endow it with international personality as already defined. However, since it is for the States to create the preconditions of the existence of a complete international person, they are also entitled to limit by constitutional provisions some or other of the rights arising from that personality.<sup>1</sup>

## PART V

### THE DOCTRINE OF IMPLIED POWERS AS APPLIED TO INTERNATIONAL ORGANIZATIONS

#### 1. *Conclusions to be drawn from international cases*

A survey of cases in which international tribunals have applied the doctrine of implied powers to justify functions or powers not expressly granted demonstrates:

- (a) that they have never dealt with those rights arising from personality as defined above but with problems related to functions or powers or field of action (*compétence*) of the organizations and so provides additional proof that the doctrine of implied powers is not the basis of those rights;
- (b) that there is a principle of functional limitation in the law of international organizations.

In the *Interpretation of the Greco-Turkish Agreement* case of 1 December 1926, the Court had to determine only whether it was

. . . for the mixed Commission for the exchange of Greek and Turkish populations to decide whether the conditions laid down by Article IV of the final protocol . . . are or not fulfilled or is it for the arbitrator contemplated by that article to decide this . . . ;

and secondly, whether

. . . the conditions laid down by the said Article having been fulfilled, to whom does the right of referring a question to the arbitrator contemplated by the Article belong?<sup>2</sup>

In its advisory opinion of 12 August 1922, the Permanent Court had to decide whether or not the competence of the International Labour Organization extended to the international regulation of the conditions of labour

<sup>1</sup> They would thus create a subject of international law rather than a complete international person (see above, pp. 137-8).

<sup>2</sup> *P.C.I.J.*, Ser. B, No. 10, p. 16.

of persons employed in agriculture.<sup>1</sup> In its opinion on the *European Commission of the Danube*, the Court had to decide whether the Commission had the same competence upon both sectors of the Danube:

Has the European Commission of the Danube the same powers on the maritime sector of the Danube from Galatz to Braila as on the sector below Galatz? If it has not the same powers, does it possess powers of any kind? If so what are those powers? How far upstream do they extend?<sup>2</sup>

In its opinion concerning the *Personal Work of the Employer*, the task of the Permanent Court was to determine whether it was

. . . within the competence of the International Labour Organization to draw up and propose labour legislation which in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself.<sup>3</sup>

The opinion of the present Court concerning the *U.N. Administrative Tribunal, Reparation for Injuries Suffered in the Service of the United Nations* and *Certain Expenses of the United Nations* has already been discussed.<sup>4</sup>

This recourse by international tribunals to a reasoning of implied powers is a conclusive demonstration that functions and powers are not inherent in the personality of international organizations but have a different basis. The extension of the purposes conferred upon the United Nations has caused the International Court of Justice to be very ample in the interpretation of the implied powers and functions necessary for the fulfilment of the purposes of this organization. But the principle is the functional limitation, and nothing would prevent a more restrictive application of the doctrine in future cases according to their specific characteristics and circumstances. What changes is not the doctrine or the principles underlying it, but their application. Thus the Court of the European Communities—an organization of more restricted powers—applied the doctrine of implied powers in certain cases, but maintained the inapplicability of the doctrine in some others. This is not in the least contradictory, but confirms the view that this doctrine is not an open door to an unlimited interpretation of the powers of an organization.<sup>5</sup> The Court stated:

Dans ces conditions il faut constater que seule l'intervention directe de la Haute Autorité est de nature à garantir la réalisation immédiate de l'abaissement des prix qui doit obligatoirement accompagner la péréquation. La requérante a soutenu, au cours de la procédure orale, que l'absence dans le Traité d'une attribution expresse du pouvoir de fixer d'autorité les prix s'oppose à la reconnaissance d'un tel pouvoir au moyen d'une interprétation qu'elle estime extensive et inadmissible en droit. La Cour n'est pas de cet avis en tant qu'il ne s'agit dans l'espèce d'un pouvoir sans lequel comme elle vient de le constater, la péréquation ne peut fonctionner au vœu du para-

<sup>1</sup> *P.C.I.J.*, Ser. B, No. 2, p. 8.

<sup>2</sup> *Ibid.*, No. 14, p. 7.

<sup>3</sup> *Ibid.*, No. 13, p. 12.

<sup>4</sup> See above, pp. 121, 129-31; and below, p. 153.

<sup>5</sup> See above, p. 115, for Judge Hackworth's restrictive reasoning in the *Reparation* case.

graphe 26 de la Convention, c'est à dire sur la base d'un abaissement des prix immédiat est assuré. De l'avis de la Cour, il est permis sans se livrer à une interprétation extensive, d'appliquer une règle d'interprétation généralement admise tant en droit international qu'en droit national et selon laquelle les normes établies par un traité international ou par une loi impliquent les normes sans lesquelles les premières n'auraient pas de sens ou ne permettraient pas une application raisonnable et utile.<sup>1</sup>

However, the recognition of those principles did not prevent the Court from considering that they could not be applied in different circumstances, for instance, in the parallel cases concerning the interpretation of Article 70 of the C.E.C.A. treaty, which bears on the system of transport within the Community; paragraph 3 of Article 70 of this treaty provides: 'The table of rates, the rates and the provisions of all kinds relating to rates and conditions applicable to the transport of coal and steel within each Member State and between Member States shall be published or brought to the knowledge of the High Authority.'<sup>2</sup> This provision which stipulates an obligation for the member States had been the object of a regulation by the High Authority which was intended to be applicable to the former when fulfilling this obligation. The Court, rightly, annuls this decision, stating:

Il faut donc constater que ces prescriptions [Article 70 (3)] sont muettes tant en ce qui concerne les modalités de leur application que les mesures d'exécution qu'elles supposent et que très certainement elles n'attribuent à la Haute Autorité aucun pouvoir de prendre des décisions à cet effet . . . d'ailleurs une comparaison entre l'article 70 alinéa 3, et les dispositions de l'article 60 paragraphe 2 (a) révèle que, dans une matière parallèle, le traité a assorti l'obligation de publication prévue à l'article 60 du pouvoir accordé à la Haute Autorité de pourvoir à son application en prescrivant que cette publication doit se faire 'dans la mesure et dans les formes prescrites par la Haute Autorité, et après consultation du Comité Consultatif' . . . on doit voir dans le fait que pour la publication des barèmes des prix et conditions de vente appliqués sur le marché commun le traité a expressément investi la Haute Autorité d'un pouvoir normatif, prévoyant même le contrôle du Comité consultatif, la preuve de l'importance qu'il attribue à la matière et à sa réglementation par la Haute Autorité; . . . l'absence de toute prévision ad hoc à l'article 70 démontre au contraire que, dans le domaine des transports, le texte du traité refuse à la Haute Autorité tout pouvoir de décision d'exécution.<sup>3</sup>

## 2. *Implied powers and implied functions*

Ferrari-Bravo and Giardina,<sup>4</sup> basing themselves on the advisory opinion in *Certain Expenses of the United Nations*, distinguish between the concept of *poteri impliciti* for the exercise of functions already attached to the organizations and the concept of *funzioni impliciti*. The latter, they claim, was introduced by the Court and relates to those tasks which, although not

<sup>1</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. II, pp. 304-5.

<sup>2</sup> See on this, Green, *Political Integration by Jurisprudence* (1969), pp. 440-1.

<sup>3</sup> *Recueil de la jurisprudence de la C.J.C.E.*, vol. II, pp. 687-8.

<sup>4</sup> *Trattato istitutivo della Comunità Economica Europea: commentario* (1965), pp. 1702-4, Comments on Art. 235.



expressly granted to an organization, are 'necessary for the fulfilment of its ends'.<sup>1</sup> According to these writers, while the 'implied powers' could be exercised automatically by an organization in order to fulfil its functions, no similar claim could be made with reference to the 'implied functions'. These could only be undertaken by the organization either by an autonomous assumption of new powers towards the effective fulfilment of its ends or else through the presence of very general provisions in the constituent instrument showing the will of the member States to grant the organization *all* the necessary functions for the fulfilment of its aims.<sup>2</sup>

The attempt to attach juridical relevance to the distinction functions-powers (*funzioni-poteri*) does not, however, seem to be well founded. Even if their distinction is accepted, there would not seem to be very much difference between '*poteri* automatically exercised' (as a way of undertaking new powers) and 'autonomous assumption of new powers' (as a way of undertaking new functions). Furthermore, no such distinction arises from the jurisprudence of the implied-powers doctrine as applied by international tribunals. Would it be possible to say, for instance, that when the Permanent Court dealt with the question whether or not the International Labour Organization was competent to regulate the employer's work and solved the problem in an affirmative manner, this was not a case of implied function but of an implied power?<sup>3</sup> The distinction between *poteri* and *funzioni* regarding international organizations was introduced by Sereni,<sup>4</sup> but has not been generally admitted even in Italy.<sup>5</sup> Most con-

<sup>1</sup> *Trattato istitutivo della Comunità Economica Europea: commentario* (1965), p. 1704 (5).

<sup>2</sup> *Ibid.*, p. 1704.

<sup>3</sup> Very often the I.C.J. and the P.C.I.J. have used the word 'power' in the broad sense of competence, which covers the notion of function. See, for instance *P.C.I.J.*, Ser. B, No. 14, p. 64. The English text says: '... it has power to exercise these functions to their full extent', but the French version reads: '... elle a compétence pour exercer ces fonctions dans leur plénitude ...'.

<sup>4</sup> It is not disputed that theoretically a distinction may be drawn between powers and functions. What is maintained is that the distinction has no practical consequences so as to make it a fundamental division in the law of international organizations, and that it has not been adopted by international tribunals. Besides, the practical application of the distinction as drawn by Sereni, *Diritto internazionale* (1960), vol. 2, pp. 871, 973, is confusing so that instances of *funzioni* could perfectly well be brought within the concept of *poteri* and vice versa. He defines the functions as 'l'oggetto delle attribuzioni ad esse spettanti in relazione alle loro finalità' (p. 871), and the powers as 'i mezzi e gli spedienti giuridici che consentono alle organizzazioni internazionali di esplicare quelle attività e di produrre quegli effetti nell'ambito di un ordinamento giuridico che sono necessari u opportuni per l'attuazione delle loro finalità e l'esplicazione delle loro funzioni' (p. 974). He classifies the functions under: (1) study, information, documentation and preparation; (2) stimulation of the activities of the members; (3) co-ordination and integration; (4) assistance to States; (5) supervision and control; (6) settlement of disputes; (7) assistance to refugees and fugitives; (8) military functions; (9) government functions. But, this enumeration of functions, it is believed, could perfectly well fall within the definition Sereni gives to *poteri* as juridical means which enables the organization to accomplish its ends. Most of the *poteri* in the international plane Sereni enumerates correspond with the rights arising from personality, as seen above.

<sup>5</sup> Monaco, for instance (*Lezioni di organizzazione internazionale* (1965-8), vol. 1, pp. 121 et seq.) under the general heading 'Funzioni degli enti internazionali' uses indifferently and

stitutions of international organizations do not draw any such distinction between functions and powers, and either use those words indiscriminately or else rather tend to use the word function.<sup>1</sup> An example is the United Nations Charter in which the several Articles concerning the competence of the General Assembly, the Security Council, E.C.O.S.O.C. and the Trusteeship Council each bear the heading 'Functions and Powers'.<sup>2</sup> However, no legal consequences attach to that distinction and the competence of the respective organs embraces both notions. Moreover, the use of the two terms in the Charter is sometimes illogical and inconsistent. Thus, according to Article 16, the approval of the trusteeship agreements by the General Assembly is a function and not a power, whereas according to Article 11, 'to consider the general principles of cooperation in the maintenance of international peace and security is expressed as a power and not a function'.

### 3. *Distinction between 'included' and 'implied' competence*

Much more logical and useful seems to be the distinction drawn by Rouyer-Hameray between *compétences incluses* and *compétences impliquées*, within the broad concept of *compétences implicites*. The former are those . . . *qui sont jugées inhérentes à sa définition, ou à la définition des compétences qui lui sont expressément attribuées*.<sup>3</sup> The latter are those which . . . *sont impliquées parce que nécessaires au regard d'un point ou d'un autre*.<sup>4</sup> This distinction is logical because the processes of reasoning are different in the two cases: in the first the true problem is to determine what is the real content or extension of a certain notion given to the organization as purposes or functions or included in the very type of the organization; in the second, the problem is to determine whether or not some connecting rod exists which makes it necessary for the organization to exercise certain functions and powers to make possible the exercise of purposes and functions expressly provided.

The distinction is also useful for two reasons. First *les compétences incluses* make it possible to apply the traditional methods of interpretation of treaties while the *compétences impliquées* look to the application of criteria proper to the practice and law of intergovernmental organizations in order to determine what has to be considered as 'necessary or essential'.<sup>5</sup> Secondly, alternatively the words *funzioni*, *poteri* or *potestà* to name aspects which are carefully distinguished by Sereni.

<sup>1</sup> W.M.O., Charter; and see particularly Art. 2 (v) of W.H.O., which within the enumeration of the functions of the organization incorporates the doctrine of 'implied powers': 'generally to take all necessary action to attain the objective of the organization'.

<sup>2</sup> See Arts. 10-24, 62-87, U.N. Charter.

<sup>3</sup> Rouyer-Hameray, *Les Compétence implicites des organisations internationales* (1962), p. 81.

<sup>4</sup> *Ibid.*, p. 72.

<sup>5</sup> These criteria would fall under Art. 31 (3), para. C. of the Vienna Convention on the Law of Treaties which provides that in the interpretation of treaties (in this case the constitutive

while the process of inclusion may be applied to the purposes of the organization [to interpret what their real scope is], the implication principle may only be applied to its functions or powers.

## PART VI

### FURTHER CONSIDERATIONS AND CONCLUSIONS

#### 1. *Possible customary rights arising from the functional structure of international organizations*

What has been said above does not exclude the possibility that international organizations may acquire in the course of time customary international rights and duties other than those arising from their international personality. After all the existence and practice of international organizations and the legal theory concerning them are very recent compared with those of States. Just as for centuries States have enjoyed customary rights and duties other than those arising from their personality, so it is possible for international organizations to acquire certain customary rights arising from their specific structure and legal preconditions, particularly from their functional nature. For instance, as already seen, practice and recurrent decisions of international tribunals lead to considering as a customary international right of international organizations their resort to implied powers and functions. Likewise, some writers maintain that in practice at least some aspects of privileges and immunities enjoyed by organizations already fall within the domain of customary international law.<sup>1</sup> But while the basis of State immunities is the principle of sovereign equality, the foundation of privileges and immunities of international organizations is functional necessity<sup>2</sup> and this is also a reason for their differences in practice.<sup>3</sup>

Again, among customary rights arising from the functional structure of international organizations might be placed the right to organize the working of its internal organs, the right to establish the procedure, rights of the staff, and even the creation of new organs.<sup>4</sup> All these have a functional

instruments of international organizations) 'there shall be taken into account together with the context . . . any relevant rules of international law applicable in the relations between the parties'.

<sup>1</sup> Cf. Seidl-Hohenveldern, *loc. cit.* (above, p. 114 n. 2), p. 51; Weissberg, *op. cit.* (above, p. 115 n. 2), p. 144.

<sup>2</sup> Cf. Alhuwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (1964), p. 199.

<sup>3</sup> Cf. Bowett, *op. cit.* (above, p. 112 n. 2), pp. 281, 288.<sup>a</sup>

<sup>4</sup> What is called by Seyersted (*United Nations Forces in the Law of Peace and War*, p. 144), 'organic jurisdiction', inherent to the international personality of the organization.



basis. As the International Court of Justice put it in the *Administrative Tribunal* advisory opinion:

The Court finds that the power to establish a tribunal to do justice as between the Organization and the staff members was essential to ensure the efficient working of the Secretariat and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.<sup>1</sup>

In short, those functions—if not expressed—may be implied.<sup>2</sup>

However, it is necessary to point out that customary rules may arise out of implied powers and functions only when, as in the case of immunities or internal jurisdiction, certain problems pose themselves as emerging from the common functional structure of international organizations or from the similarity of certain functions common to them.<sup>3</sup> In most cases because of the diversity of purposes and functions among organizations, the implied powers doctrine cannot give rise to customary rules and must be the object of a particular application.

## 2. *Basic distinctions*

So far, emphasis has been placed on drawing certain distinctions concerning the legal categories within the constitutional framework of international organizations and in dispensing with others. This makes it possible to lay down the following typology, which also serves to establish a measure of order in the legal terminology:

### (a) *Purposes, ends, aims or objectives:*

These constitute the goals and scope of attainments for which an organization has been created.

### (b) *Rights arising from international personality:*

These enable the organization to manifest itself as a distinct entity on the international plane as well as to enter into relationship with other persons of international law.

### (c) *Functions (or/and powers):*

These range from material concrete tasks to juridical powers of action and constitute the means through which an organization fulfils its purposes *vis-à-vis* its members.

<sup>1</sup> *I.C.J. Reports*, 1954, p. 57.

<sup>2</sup> Seidl-Hohenveldern says: 'Provisions in constituent instruments of international organizations authorising the establishment of subsidiary organs or the adoption of rules of procedure appear redundant and even dangerous, as they may give rise to a *contrario* conclusions'; loc. cit. (above, p. 114 n. 2), p. 49.

<sup>3</sup> As Schneider writes: 'Competences, though greatly differing, have been attributed to organizations to the same end, namely to allow these bodies to take care of large parts of international relations which their technical skill and neutral apparatus are called upon to handle. In order to operate in the territory of member and other States, to ensure effective cooperation with other organizations, to protect their civil servants etc. organizations are facing the same problems' (op. cit., pp. 135-6).

*(d) Principles:*

These are modalities to which an organization must adjust its activity when attaining its purposes. They are not ends in themselves which imply a positive obligation for the organization, but rather ends which the organization fulfils in an indirect way by not acting against them.

*(e) International acts:*

These are manifestations of will of the organizations designed to produce legal effects on the international plane. The capacity to perform them constitutes a right arising from personality.

The due distinction of the elements of this typology is not without important practical consequences and a brief account must be given here.

The purposes are fixed by the constituent instrument of the organization and they cannot be implied. They constitute the most rigid limit to the activity of the organization. They may be the object of interpretation through what Rouyer-Hameray would call *raisonnement d'inclusion* so as to develop their real contents. Besides, a delimitation of the purposes is essential to determine the possible existence of *détournement de pouvoir*.<sup>1</sup>

The rights arising from personality are unassailable by the member States in the sense that they could not, for instance, claim before an international tribunal that the conclusion of a certain treaty by an international organization was not necessary or not 'essential', provided that the functions exercised by means of that treaty were well within the limits of the organization either expressly or by implication. The exercise of those rights is not subject to the criterion of necessity, even if not expressly provided for.

The functions and powers, on the contrary, if not expressly provided for, can only be implied through the criterion of necessity; and it is this which makes them assailable by member States in proceedings before an international tribunal.

Finally, the 'principles' of the organization loom large in regulating the relations between the organization and its member States. Their violation may entail the international responsibility of the organization *vis-à-vis* its members.

### 3. *Conclusions*

International organizations possess international personality when they fulfil certain objective preconditions: an international agreement creating an association of States endowed with at least one organ which expresses

<sup>1</sup> See Fawcett, '*Détournement de pouvoir* by International Organizations', this *Year Book*, 33 (1957), pp. 311 et seq.; see also Sereni, *op. cit.* (above, p. 118 n. 1), pp. 876, 1057; Detter, *op. cit.* (above, p. 113 n. 2), pp. 305-8.

a will detached from that of the member States and possessing defined aims or purposes to be attained through the fulfilment of functions or powers.

As in the case of States, international personality is not a mere formal concept but entails precise legal consequences which may be summed up as enabling the person to operate on an international plane, manifesting itself as a distinct entity and entering into relationships with other international persons.

This personality is dependent upon general international law in the sense that it is customary to assume that States creating an organization with the characteristics defined above endow it with a full legal capacity. But since it is for them to create the organization, they might also limit some rights arising from personality if particular provisions of the constitution so specify.

Special care must be taken not to confuse the field of rights arising from international personality common to all international organizations, and the field of implied powers or functions particular to each organization.

International organizations like States possess two categories of rights: those which derive directly from their quality as an international person, and those which arise from their specific characteristics as subjects of international law, and especially from their functional nature.





# THE FUNCTION OF LAW IN INTERNATIONAL COMMODITY AGREEMENTS\*

*By* J. E. S. FAWCETT

INTERGOVERNMENTAL commodity agreements are instruments of trade regulation and, as such, a form of international organization. Law can be seen at work in them in both aspects, and so we shall look in turn at the general principles of law applicable in international trade, at the particular role of commodities in that trade, and at the main objects and types of commodity agreements.

## I

In an ideal pattern of international trade left wholly to market forces, the export and import of goods would be determined by comparative advantages. So a perceptive petition of merchants to Parliament in 1820 stated that:

... foreign commerce is eminently conducive to the wealth and prosperity of a country by enabling it to import the commodities, for the production of which the soil, climate, capital and industry of other countries are best calculated, and to export in payment those articles for which its own situation is better adapted.

But such an ideal pattern of trade does not of course exist, for the natural flows of trade and market forces are being constantly enlarged, diminished, or directed by the intervention of governments, pursuing often conflicting policies both domestic and external; by the international production of multinational corporations; by cartels and other agreements between producers; and by the great inequality of the trade resources of the industrialized and the developing countries. In place then of a self-regulating system of international trade, there are gross trade imbalances, particularly in the production and movement of commodities, which can only be corrected by the deliberate regulation of trade.

The modes of regulation of international trade vary much in their efficiency, their authority, and the area of their operation; and whether a particular mode of regulation is to be characterized as legal depends upon the value assigned in it to each of these variables. So, for example, direct government intervention in the production or movement of goods, having a statutory or administrative basis, can have a high degree of authority and efficiency, but is limited to its area of State jurisdiction, though its economic

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repercussions may be much wider; producers' agreements, based on contractual arrangement, may have a wider, international area of operation and economic impact, but their authority may be impaired by rules against monopolies and other legislative obstacles; and intergovernmental trade agreements may not be wholly efficient regulators for all their authority and international range, because they do not go at critical points beyond recommendations or declarations of principle. In these examples it is possible to discern a number of ways in which law functions in the regulation of commodity trade, by rules of public law, embodied in statute or treaty; by administrative act or decision; by contractual arrangements of public or private law; by property rights; by directive principles; and by the equitable prohibition of unfair competition. Before some of these are examined more closely, the place of commodities in international trade must be described.

## II

The classification of commodities in the different dimensions of food resources, commercial policy, technological change, and exports of developing countries, brings out the interlocking problems of commodity trade regulation.

The F.A.O. Indicative World Plan (1969) groups regions of the world according to their basic foods. For North America, Western Europe, Oceania and the River Plate countries, animal products are basic foods; and, while central and southern Europe, North Africa and the Middle East have wheat-based diets, central America and eastern Africa have diets based on maize, and Asia and the Far East diets based on rice: for Equatorial Africa it is composed of roots and tubers. The fact that these diets are in descending order as sources of protein is a world food problem, and accounts in part for there being over sixty importing countries in the International Grains Arrangement (1967), and for the semi-industrial production of poultry, meat and eggs.

The Havana Charter defines primary products (*produits de base*), and some of the objectives of commodity agreements, in terms of commercial policy. Article 56 (1) reads:

For the purposes of this Charter, the term 'primary commodity' means any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required *to prepare it for marketing in substantial volume in international trade*.

Article 57 names among the objectives of intergovernmental commodity agreements:

- (a) to prevent or alleviate the serious economic difficulties which may arise *when adjustments between production and consumption cannot be effected by normal market forces alone* as rapidly as the circumstances require;



- (c) *to prevent or moderate pronounced fluctuations in the price of a primary commodity with a view to achieving a reasonable degree of stability on a basis of such prices as are fair to consumers and provide a reasonable return to producers, having regard to the desirability of securing long-term equilibrium between the forces of supply and demand;*
- (f) *to assure the equitable distribution of a primary commodity in short supply.*

These objectives have been modified by the effects of technological changes on commodity trade, and by the role of commodities in the export trade of developing countries.<sup>1</sup> In industrialized countries the pattern of demand has shifted towards capital goods, chemicals, durable consumer goods and certain foodstuffs such as meat, poultry and frozen vegetables. The demand for the majority of primary commodities, which form the exports of developing countries, does not increase markedly with income increase in industrialized countries, exceptions being petroleum and metals. Further, the production of synthetic substitutes offers severe competition. The United Nations Conference on Trade and Development (U.N.C.T.A.D.) has stressed further difficulties for countries dependent on export of primary commodities.<sup>2</sup> First, the more inelastic the demand for a commodity, the narrower is the range within which the price can be stabilized so as to make export earnings constant; on the other hand, some increase in prices will not itself reduce demand. Secondly, there is a time-lag in increasing production between investment and output in tree crops such as sugar, coffee, cocoa, tea and olive-oil. Third, domestic production has increased in industrialized countries of cotton, cereals, oil and fats and sugar, and measures of protection for it create further obstacles to trade. Of commodities produced wholly or mainly in developing countries, only coffee, tea, cocoa and tin do not face serious substitute competition,<sup>3</sup> while of those produced in both industrialized and developing countries, sugar, cereals, vegetable oils, tobacco and wine face appreciable trade barriers to imports.<sup>4</sup> Foreign exchange earnings from exports of agricultural products except cotton, have been since 1955 markedly unstable or in decline, particularly sugar and coffee.

Some of the factors which have made necessary or possible the conclusion of intergovernmental agreements can thus be seen: absence of serious substitute competition (tin, coffee and cocoa) and existence of appreciable trade barriers protecting producers or facing exporters in both industrialized and developing countries (sugar, wheat). On the other hand,

<sup>1</sup> 'Commodity Problems and Policies', *U.N.C.T.A.D. Second Session Report* (1968), vol. ii.

<sup>2</sup> In 1966 the U.S., U.K., France, Italy and Japan together accounted for almost 80 per cent of global food imports, equalling about 90 per cent of exports from developing countries.

<sup>3</sup> Those facing competitive synthetic substitutes are jute, rubber, hard fibres, wool and cotton.

<sup>4</sup> Those not facing appreciable trade barriers are copper, iron-ore, bauxite, lead, zinc, manganese and fish.

market-control agreements are no longer seen to be sufficient. In a report by the U.N.C.T.A.D. Secretariat<sup>1</sup> it was said:

the fundamental objective of intergovernmental cooperation in the field of primary commodity trade should be to act on market forces in such a way as to facilitate the maximisation of export income . . . commodity policy needs to be directed towards achieving the maximum possible level of earnings from exports of the primary products of the developing countries.

But the change in objectives is far from realization in practice.<sup>2</sup> What we are witnessing in U.N.C.T.A.D. is a movement to substitute in effect the developing countries as primary producers, whose export earnings should be maximized, for the older frankly capitalistic producers, who secured large profits from commodity trade by cartel agreements. Another side of the movement is the strong political pressure to replace aid by trade.

We can now describe some of the ways of regulating international commodity trade and the place of law in them, taking in turn producers' agreements and the mechanisms of intergovernmental commodity agreements. The operation of waivers and the settlement of disputes will then be considered.

### III

Producers' agreements in commodity trade have a long history, and a substantial part of world trade has been conducted under them.<sup>3</sup> Comparison of two agreements, concluded before the Second World War, will bring out features of interest in the conclusion of intergovernmental commodity agreements.

The International Sulphur Agreement (1934),<sup>4</sup> reviving an earlier agreement of 1923, was concluded between the Sulphur Export Corporation, registered in the State of Delaware, and the Ufficio per la Vendita dello Zolfo Italiano, a statutory body created for sales of Italian crude sulphur. The agreement 'refers to and covers all sales of sulphur made by the two parties to all countries of the world' except Italy and its dependencies, North America, Cuba, and possessions of the United States. All export sales are apportioned between the parties on an elaborately prescribed basis, and

The prices, which at all times are to be such as will foster the sale of high-grade sulphur produced by the parties hereto in competition with . . . others . . . shall, together with terms and conditions of all sulphur sold under this agreement, be fixed from time to time by the parties having regard to changing conditions, in such manner as best to serve their mutual interests.

<sup>1</sup> U.N. Doc. TD/B/C. 1/26 (26 October 1966).

<sup>2</sup> U.N.C.T.A.D. has still under consideration a possible General Agreement of Commodity Arrangements.

<sup>3</sup> See generally E. Hexner, *International Cartels* (1946).

<sup>4</sup> For text see *ibid.*, Appendix VIII B.

Allocation and distribution of tonnage sold is to be fixed from time to time, and

. . . in case either party shall directly or indirectly export any sulphur or permit the export of any sulphur . . . otherwise than as herein provided, for each ton so exported there shall be a reduction in such offending party's allocation . . . of two tons, and an increase in the allotment of the other party of two tons.

The legal structure of the agreement is clearly delineated: in addition to provision for arbitration, to be subject to the English Arbitration Act, 1889, it is agreed that:

. . . this contract shall be deemed to have been executed and delivered at the City of London, England, and the interpretation and enforcement thereof shall be governed by the provisions of English law . . . and . . . subject to the provisions hereof respecting arbitration, jurisdiction shall be given to the English Courts to take cognizance of disputes hereunder and to render judgement or decree which shall be binding upon the parties.

Further, the agreement is not to be construed 'as a partnership or agreement between the corporations, holding shares of the Export Corporation, and the Offices' nor as binding any of these corporations individually or the Italian Government.

The World Copper Agreement (1935)<sup>1</sup> presents a different picture. Concluded between ten companies<sup>2</sup> it is described as a 'memorandum of provisions' to bring about better conditions in the production, distribution and marketing of copper through the world outside the United States'. The prime object of the agreement is the curtailment of production of copper on agreed tonnage bases, initially for a period of three years, though a committee of five representatives of participating companies is appointed to

. . . undertake a study of the entire problem of the cooperative marketing of copper (in the markets to which the memorandum applies) and . . . make a final report of its recommendations to the participants as soon as practicable, for acceptance by all participants.

The memorandum does not indicate any system of law applicable to it, nor is there provision either for arbitration or for jurisdiction of any national courts over disputes arising under it. However, a Central Committee, again composed of five representatives, is established to manage the agreement, in particular, by gathering and distributing statistics and arranging for increases or decreases in production. Further, in addition to being

<sup>1</sup> For text see *ibid.*, Appendix VIII D.

<sup>2</sup> Seven based in Europe or Africa and a group of three operating in South America.



empowered to 'receive, consider and decide questions relating to interpretations of this memorandum', the committee is

. . . to hear complaints relative to alleged breaches of this memorandum. If the Committee, after a hearing and after full consideration, is of the opinion that any participant has committed a breach it shall give notice to the offending participant to remedy the breach within a reasonable time fixed by the Committee. The participants agree to abide by the decision of the Committee. . . .

Differences of opinion in the committee in the exercise of any of its functions are to be settled by the 'concurring vote' of not less than four of the five members.<sup>1</sup>

The provisions of these two agreements have been set out at some length because they contain between them four elements of importance in the construction of any commodity agreement: the indication of the proper law of the agreement; the factor of government intervention; provision for the management of the agreement; and the distinction between the control of production, and the control of exports, of a commodity.

*Proper law.* The sulphur agreement is plainly a contract governed by English law with respect both to the interpretation of its provisions and to jurisdiction over disputes arising under it. But of the copper agreement we have to ask whether the participants intended to create legal relations between them at all, and if so of what kind. The memorandum contains specific undertakings by the participants, and means of having its provisions authoritatively interpreted, and of determination of disputes as to breaches of undertakings. It may be noticed that the settlement of disputes here is similar to that envisaged in the General Agreement on Tariffs and Trade (G.A.T.T.), under which,<sup>2</sup> on a complaint of nullification or impairment of benefits and after preliminary steps,

. . . the CONTRACTING PARTIES . . . shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.

Materially then these provisions of the memorandum would support a legal relationship between the participants; but formally they were not related to or governed by any particular system of law, either international, since the participants in the arrangement were private corporations, or national, since no system of municipal law is indicated as governing, either expressly or by implication. It is an arrangement which is autonomous in two senses. First, while acts in performance of the undertakings given would no doubt be governed by applicable rules of particular national

<sup>1</sup> But 'no representative of a participant against whom a complaint of breach of this memorandum is made shall sit upon the Committee which decides whether such a breach has been made'.

<sup>2</sup> Article XXIV-2.

systems of law, for example, on restrictive trade practices, the undertakings would not be enforceable in any national court, and the observation of Scrutton L.J.<sup>1</sup> would apply. Further, neither the committees established nor the association of corporations itself would be legal persons, capable themselves of engaging in the production, purchase or sale of copper. Secondly, the arrangement is self-regulating in that undertakings are subject *within the system* to interpretation and to enforcement, at least to the extent of declaration of liability. But it is hardly possible to deny its contractual character.<sup>2</sup>

*Government intervention.* Government may intervene in commodity trade as regulator or competitor. Regulation will in general depend on statutory or subordinate forms of legislation and will consist of measures of protection, price support or income subsidy for domestic production of a commodity; and measures to correct an imbalance of payments or for purposes of defence or public health. Characteristic measures are tariffs, export duties or subsidies, and adoption of multiple exchange rates. These operate essentially on the price of commodities being imported or exported. Quantitative import restrictions, on the other hand, limit the volume or number of goods of a particular class or origin, which may be imported, to fixed quotas; and tariff quotas may work in the same way.

Some of these may be a little more fully described since commodity and other agreements are often designed to limit or circumvent their use. An export subsidy, often associated with dumping, may be direct, by way of such statutory devices as export certificate payments, transport or storage grants, tax exemption on production for export, or favourable exchange rates for exports. It may also be the indirect consequence of farm income support, by guaranteed minimum prices or government credit. Examples can be found in the marketing of wheat. The Canadian Wheat Board, as sole agent for the marketing of wheat produced in western Canada, would make a basic payment to producers of \$1.50 a bushel, any excess of sale proceeds, after deduction of expenses, being also paid over to them. Similarly, in the United States the Agricultural Adjustment Act, 1935, authorized both the use of up to 30 per cent of United States customs revenues for export subsidies of agricultural products, and the imposition of quantitative import restrictions where imports threatened the agricultural

<sup>1</sup> 'I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention . . .', *Rose and Frank Co. v. J. R. Crompton Bros. Ltd.* (1923), 2 K.B. 261, 288.

<sup>2</sup> See a League of Nations study quoted by E. Hexner, *op. cit.* (above, p. 160 n. 3), p. 60: 'These international contractual organisations represent simply a grouping of interests, and do not generally possess individual juridical personality. . . . Such cartels however constitute, as between their members, unions or corporate groups, which can hardly operate in any permanent sense without fairly strict discipline and an internal administrative organisation to direct their activities and enforce the clauses of the contract as against members of the cartels', *Review of the Legal Aspects of Industrial Agreements* (1930), pp. 6-7.

programme.<sup>1</sup> Dumping has been defined as 'sales for export at lower prices than those charged at the same time and under like circumstances to buyers for the domestic market'. Its uses may vary: for example, to reduce a temporary surplus, or to eliminate competition in a new market, or to obtain urgently needed foreign currency.

Argentina, like many other countries in Latin America, has used multiple exchange rates, in part as a means of subsidizing wheat exports. Multiple rates work in the following way: if the official exchange rate between the currencies of country A and country B is  $10 = 1$ , a multiple rate of  $8 = 1$  may be established in country B for exports of a particular commodity so that an exporter, who has earned 2,000 units of currency A, will obtain in exchange 250 units of his own currency, instead of 200 at the official rate.

Government appears as a competitor when it engages in commodity trade through State enterprises. These comprise departments of government, in so far as they are engaged in trade, and marketing boards or other enterprises, which are established by public authority and have a monopoly of the importation or exportation of goods in law or in fact.<sup>2</sup> They may be distinct legal persons, though this fact alone will not determine the extent of their separation from the State.<sup>3</sup> The essential feature of State enterprises engaged in commodity trade is that they can influence by their purchases and sales the general level and direction of imports and exports. Further, where a State enterprise controls both imports and the domestic market of a commodity, it can, by offering imports of the commodity at higher than domestic prices, provide protection for domestic supplies and thereby nullify any agreed tariff for the commodity, and also render difficult the determination of 'normal values' in case of export subsidies.

*Management of the agreement.* The producers' agreements show the need, to make them effective, for consultation and decision by the participants to be in some way institutionalized. Representative bodies are then established under the agreement with one or more of three possible functions: the collection and distribution of statistical information on the trade movements of commodities; consultation on the common policy to be followed or on changes in it; and supervision of the operation of the agreement and, in particular, of the observance by participants of their undertakings under it. The participants may delegate a power of decision, for one or more

<sup>1</sup> G.A.T.T. rules on subsidies are expressly extended to cover primary commodities: see Note and Article XVI. See also L. A. Wheeler, 'Government Intervention in the Wheat Trade', *Journal of World Trade Law*, 1 (July-August 1967).

<sup>2</sup> The 'exclusive or special privilege' referred to in Article XVII, 1a, of G.A.T.T.

<sup>3</sup> See *Baccus S.R.L. v. Servicio Nacional del Trigo* (1957), 1 Q.B. 438; and Trajan Ionasco, 'Foreign Trade Corporations', in *Sources of the Law of International Trade* (ed. by C. M. Schmitt-hoff), pp. 52-67, showing differences between foreign trade corporations in Czechoslovakia and Yugoslavia on the one hand and the U.S.S.R. on the other.



purposes, to the representative body. We shall find these forms of management much developed in intergovernmental commodity agreements.

*Production and exports.* A comparison of the sulphur and copper agreements already described reveals a distinction between common regulation of production, whether by curtailment of increase, and of exports, by quota or otherwise. This distinction is basic, for an intergovernmental commodity agreement aimed at the regulation of production must, in both economic and political terms, be more complex and far-reaching and more difficult to negotiate and manage than one limited to export regulation.

Perhaps the most notable producers' agreement now in operation is that which established the Organization of Producing and Exporting Countries (O.P.E.C.) for petroleum in September 1960. Formed by countries leading in production,<sup>1</sup> it was a response to the fall in petroleum prices in the late fifties, due in part to import controls in the United States, price reductions in Venezuela and the incursion of oil from Soviet Russia into world markets.<sup>2</sup> A feature of interest to the organization of commodity trade is the form of barter exchange of commodities, by which the National Iranian Oil Company (N.I.O.C.) sold crude oil to Argentina at a substantial discount in exchange for shipments of wheat to Iran, sales at discount being a part of O.P.E.C. operations.<sup>3</sup> O.P.E.C. has also envisaged a code of uniform petroleum legislation and the establishment of a high court to settle disputes.<sup>4</sup>

Sultanas are covered by a producers' agreement now in force, but the International Tea Agreement lapsed in March 1965, and the International Cocoa Producers' Alliance came to an end a month earlier. However, the possibility of new agreements covering these commodities is still being pursued.<sup>5</sup>

We now turn to consider more extended and sophisticated intergovernmental commodity agreements, those on sugar, coffee, wheat and tin.

The International Sugar Agreement, which entered into force on 17 June 1969, established the International Sugar Organization. Sugar production and trade has had a long and troubled history. Sugar-producing territories were prizes in the peace settlements of the second half of the eighteenth century and centres of slavery, and the protected production of beet-sugar which began in continental Europe in the mid nineteenth century was picked out by Marx and Engels as a leading example of the

<sup>1</sup> Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. Qatar joined in 1961, and Indonesia and Libya in 1962.

<sup>2</sup> Soviet oil exports have increased to Italy, Federal Republic of Germany, Finland, Sweden and France.

<sup>3</sup> Note the prohibition of barter involving sale of coffee: International Coffee Agreement, Art. 51.

<sup>4</sup> Resolution 41 (Riyadh Conference, 1963).

<sup>5</sup> See, on cocoa, U. Wassermann, 'Towards an International Cocoa Agreement', *Journal of World Trade Law*, 2 (September–October 1968).

industrialization of agriculture.<sup>1</sup> This competition and the long decline in sugar prices in the last quarter of the century led to the International Sugar Agreement (1902). A permanent commission was created, empowered to order changes in the domestic regulations of participants, which imposed tariffs or granted unfair bounties in the sugar trade. It was the first international body able to take binding decisions by majority vote. Later agreements were concluded in 1949, 1953 and 1958, the last ceasing to operate in 1963. The International Coffee Agreement, which came into force on 12 October 1968, continuing in effect the earlier agreement of 1962,<sup>2</sup> deals with a commodity produced in developing countries which differs from sugar in facing no competition from production or substitutes in industrialized countries. The International Grains Arrangement which entered into force on 1 July 1968, is composed of two conventions: the Wheat Trade Convention and the Food Aid Convention. It stands in the line of a number of agreements which were revised or renewed from 1949 to 1967;<sup>3</sup> the substantive economic provisions of the International Wheat Agreement (1962) ceased to operate on 31 July 1967, though the administrative provisions, and particularly those governing the International Wheat Council, remained in effect for another year, making possible the conclusion of the new arrangement. The United Nations Wheat Conference convoked for early 1971 is to negotiate a new agreement in place of the Wheat Trade Convention which expires on 30 June 1971.

The third International Tin Agreement entered into force on 21 March 1967. Tin had been covered by a number of arrangements within the trade from 1920. The Tin Producers Association, formed of mining interests in Malaya, Burma, Thailand and Nigeria in 1929, concluded an agreement in 1931, which was renewed three times up to 1942, for production quotas and the maintenance of a tin pool. Intergovernmental agreements were concluded in 1956 and 1961.<sup>4</sup>

Aspects of these four commodity agreements to be examined now are the forms of country participation, the instruments used for regulating trade in the commodity, and the powers of the managing authority.

#### IV

*Participation and structure.* Some international organizations can be described as unions, and may also be named as such. It is possible to pick

<sup>1</sup> See J. Southgate, 'World Trade in Sugar', *Journal of World Trade Law*, 1 (November–December 1967); and also 'International Sugar Conference', *ibid.* 2 (July–August 1968), and 'International Sugar Agreement, 1968' (Cmnd. 4210), *ibid.* 3 (March–April 1969).

<sup>2</sup> See *Law and Contemporary Problems*, 28 (1963), pp. 328, 379; and *American Journal of International Law*, 57 (1963), p. 888.

<sup>3</sup> See L. A. Wheeler, 'Government Intervention in the Wheat Trade', *Journal of World Trade Law*, 1 (July–August 1967), and the 'International Grains Arrangement, 1968' (Cmnd. 3840), *ibid.* 2 (March–April 1968).

<sup>4</sup> Cmnd. 12 and Cmnd. 1759.

out three characteristic features of international unions. First, they are based on agreements on particular problems of common interest, which call for intergovernmental co-operation but are capable primarily of technical or administrative, rather than political, solutions. It is in this sense that the United Nations Charter in Article 57 (1) speaks of the various specialised agencies, established by intergovernmental agreement and having wide international responsibilities '... in economic, social, cultural, educational, health and related fields . . .'. The second feature of a union is that the various interests in the specialized field in which it operates are combined and represented in it. Finally, a union has a permanent structure of intergovernmental organs and a secretariat, which is the servant of the union, independent of governments. It is to be observed that the Sugar and Coffee Agreements, which are the latest and perhaps the most sophisticated of the agreements, establish an International Sugar Organization and an International Coffee Organization, of which the International Sugar Council and an Executive Committee, and the International Coffee Council and an Executive Board, are respectively the principal organs. These organizations closely resemble in structure and functions the specialized agencies of the United Nations. The commodity agreements meet these various criteria in the following ways.

Their objectives are the better management, by technical and regulatory devices, of the international trade in the commodity concerned.

The contracting parties in all the agreements are Governments. However, the contracting parties and the participants do not altogether coincide, for participation is essentially functional. So the participating countries are divided into two groups: importing members and exporting members in the Sugar, Wheat and Coffee Agreements, and producing countries and consuming countries in the Tin Agreement.<sup>1</sup> Further, participation of countries may be single, joint or several. While the great majority of participating countries in all the agreements are single States, provision is made in the Wheat Trade Convention for joint participation of the members of the European Economic Community (E.E.C.) and of a country and a territory or territories for which it is internationally responsible. For such territories the Sugar and Tin Agreements provide both joint participation with the metropolitan country and several participation for the territories themselves. The Coffee Agreement goes furthest and comprises all alternatives in providing that

. . . 'Member' means a Contracting Party; a dependent territory or territories in respect of which separate Membership has been declared under Article 4;<sup>2</sup> or two

<sup>1</sup> The notion of 'producing country' also appears in the International Coffee Agreement.

<sup>2</sup> This introduces the further complexity that a contracting party, which is a net importer of coffee, may designate dependent territories, which are net exporters of coffee, for separate membership, individually or collectively.



more Contracting Parties or dependent territories, or both, which participate in the organisation as a Member group under Articles 5 or 6.<sup>1</sup>

The United Kingdom extended the Sugar Agreement to seventeen territories under Article 66 (1) and gave notice that four of these territories, Antigua, British Honduras, Fiji and St. Christopher-Nevis-Anguilla, desired separate membership under Article 4. The latter formed a single export tonnage group with Barbados, Guyana and Jamaica, as did also the Central American Common Market and the European Economic Community.

The E.E.C. is not a separate member under the Sugar Agreement, each of the 'Six' participating as importing countries, Belgium including Luxembourg for distribution of votes. On the other hand, countries belonging to the *Organisation Africaine et Malgache de Café* (O.A.M.C.A.F.)<sup>2</sup> participate as a member group, having four votes; however, they are treated as single members for purposes of production controls, and regulation of stocks, and for certain administrative purposes.<sup>3</sup>

On signing the Sugar Agreement the U.S.S.R. made a declaration, which it confirmed on ratification, that

In the event that the European Economic Community accedes to the Agreement, the participation of the U.S.S.R. in the Agreement shall not be deemed to imply recognition by it of the European Economic Community and shall not give rise to any obligations on the part of the U.S.S.R. in respect of the Community.

It also stated that the treatment of dependent territories under Articles 4 and 66 was 'outmoded and at variance' with the United Nations General Assembly Resolution 1514-XV, and made its customary reservations respecting China (Taiwan).

The composition of the Councils is similar. They comprise representatives of all members or participating countries, and are therefore analogous to the assemblies of the specialized agencies. The International Sugar Council is described as 'the successor' to the Council established under the earlier International Sugar Agreement (1958), succession between international organizations being not without precedent. The International Wheat and Tin Councils have, however, continued in being from earlier agreements. Votes are distributed on the same basis for all the Councils, with insignificant variations: that is to say, the importing or consuming countries have one thousand votes between them, and the exporting or producing countries have also one thousand votes between them: a maximum is set of 400 or 450 votes for any one country, votes being

<sup>1</sup> Article 2 (6).

<sup>2</sup> Cameroun, Central African Republic, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Togo and Malagasy Republic. Of these the Ivory Coast is by far the largest exporter.

<sup>3</sup> Article 5 (2).

distributed either in proportion to import or export quotas in the Sugar and Coffee Agreements, or to production or consumption tonnages in the Tin Agreement, or by agreement within each of the groups in the Wheat Convention. Decisions are taken normally by a majority of votes in each of the two groups, and by two-thirds majority when so prescribed in the agreement. The Coffee Agreement has an ingenious arrangement for reducing the effect of negative votes when a two-thirds majority is required. If a proposal is defeated by the negative votes of three or fewer exporting members, or three or fewer importing members, the question is put again within forty-eight hours: if the opposition is then two or one member, it is put again within twenty-four hours: if the negative vote of one member still makes the majority fall short of two-thirds, the proposal is considered adopted.<sup>1</sup>

The Executive Committee of the Sugar and Executive Board of the Coffee Agreements<sup>2</sup> are each composed of representatives of eight importing and eight exporting countries. The Executive Committee of the Wheat Convention has representatives of four exporting and eight importing countries,<sup>3</sup> while the Tin Agreement leaves it to the Council to appoint committees as it sees fit.<sup>4</sup> Each agreement provides for a secretariat, the Sugar and Coffee Agreements again being closest to the specialized agencies in emphasizing the independence and international status of its officials.<sup>5</sup> The Wheat and Tin Agreements prohibit the holding by the Executive Secretary or staff of any financial interest 'in the trade in wheat' or 'in the tin industry or the tin trade', or their taking instructions in the performance of their functions from any person or authority external to the Council.<sup>6</sup>

The International Sugar Organization and International Coffee Organization are both accorded legal personality, including the capacity to contract, to acquire and dispose of moveable and immoveable property, and to institute legal proceedings. The 'status, privileges and immunities' of the organization, staff, experts and representatives of members are covered by a headquarters agreement with the host country.<sup>7</sup>

The Wheat and Tin Agreements are more restricted, legal capacity being accorded to their Councils in the territory of each participating country to the extent 'consistent with its laws'. In all the agreements tax exemption is withheld from nationals of the host country employed by the Council.

<sup>1</sup> Article 14.

<sup>2</sup> Articles 14 (1) and 15 respectively.

<sup>3</sup> Article 30 (1).

<sup>4</sup> Article IV D. 25.

<sup>5</sup> Article 19 (5) and Article 20, respectively, which are modelled on Article 100 (1) of the U.N. Charter.

<sup>6</sup> Article 32 and Article IV A. 8 respectively.

<sup>7</sup> See, for example, *U.K.-International Coffee Organization: Headquarters Agreement*, Cmnd. 4120 (capacity to contract, acquire moveable and immoveable property and institute legal proceedings; premises inviolable; exemption from direct taxes, and from jurisdiction and execution of judgments, except in cases involving the use of motor vehicles).

## V

*Instruments of regulation.* The instrument that is simplest, in that it calls for the least intervention by governments in commodity trade, is the multilateral contract. This expression might be used to describe many international agreements, and needs here to be completed by some such words as 'of purchase and sale'. In the Wheat Convention *datum* quantities are established by the Council before the beginning of each crop year for each participating country. These quantities are in the case of an exporting country 'the average annual commercial purchases from that country by importing countries', and in the case of an importing country its 'average annual commercial purchases from exporting countries or a particular exporting country'.<sup>1</sup> The average in each case is based, with special adjustment for steadily expanding markets, on purchases in the first four of the immediately preceding five crop years.<sup>2</sup> It may be observed here that world trade in wheat comprised about 60 million tons in 1966-7, which was about 40 per cent of production, and that the United States and Canada between them account for nearly 70 per cent of exports. The E.E.C. which is moving towards self-sufficiency in wheat, ranks as both an exporting and importing 'country' in the Convention; and the U.S.S.R. is designated as an exporting country though it has from time to time imported wheat into Siberia from Canada. The basic obligations of the participating countries may be summarized as follows:<sup>3</sup>

- (i) Wheat is to be exported at 'prices consistent with the price range',<sup>4</sup> and in quantities, to be determined by exporting countries 'in association with one another', that are 'sufficient to satisfy on a regular and continuous basis the commercial requirements' of importing countries.
- (ii) Each importing country undertakes to purchase the maximum possible of annual imports from participating countries, and to purchase wheat from non-participating countries only at prices consistent with the price range.
- (iii) The balances of commitment for an exporting country, and of entitlement for an importing country, are the amounts by which the *datum* quantities exceed actual purchases and sales at any time in the crop year. Balances may be transferred between participating countries with Council approval (Article 14 (1)).

A Prices Review Committee is responsible for review of prices and for recommending adjustment of prices or other action, when maximum or

<sup>1</sup> Article 2 (1).

<sup>2</sup> Article 15 (1).

<sup>3</sup> Combining Articles 2, 4, 5, and 15.

<sup>4</sup> A schedule of maximum and minimum prices is established for the duration of the Convention: Article 6.



minimum prices are approached for particular classes of wheat. Participating countries may appeal to the Council against any decisions of the Committee declared binding by the Convention.<sup>1</sup> Records are kept by the Council of all wheat purchases and sales by participating countries, based on reports to be made by them (Article 16). The Council may on conditions waive obligations of an importing country under the Convention where its purchases must be reduced 'to safeguard its balance of payments or monetary reserves'; the Council is required to obtain and take account of the opinion of the International Monetary Fund (I.M.F.) on 'the existence and extent of the necessity' for reduced purchases (Article 12).

How participating countries are to meet their obligations under the Convention is not prescribed in it. It is clear that government intervention in the market may under certain conditions be necessary. The Convention recognizes the possibility of State-trading, since

Where reference is made in this Convention to a purchase or sale, it shall be understood to refer not only to purchases or sales concluded between the Governments concerned but also to purchases and sales concluded between private traders and to purchases and sales concluded between a private trader and the Government concerned (Article 2 (2) (iii)).

But while price controls on private transactions might be introduced by legislation, the balance of commitment could only be met in certain circumstances by government exports based on domestic purchases by it or its agencies. So Article 17 (4) provides that

Exporting and importing countries shall be free to fulfil their obligations under this Convention through private trade channels or otherwise. Nothing in this Convention shall be construed to exempt any private trader from any laws or regulations to which he is otherwise subject.

In fact, under the first agreement of 1949 prices did not fluctuate freely between maximum and minimum as expected but were kept near the maximum by the combined interventions in the market of the United States Commodity Credit Corporation and the Canadian Wheat Board.

The Commonwealth Sugar Agreement is similar to the Wheat Convention in being essentially a long-term multilateral contract for sale<sup>2</sup> by exporting countries to the United Kingdom and Canada of quantities of sugar fixed annually. Export quotas are fixed for eight exporting countries or groups of countries,<sup>3</sup> and in 1963 totalled 2,410,000 tons, which may be compared with the quota of Cuba under the Sugar Agreement of 2,150,000 tons. Sales under the agreement take place at an agreed basic price, a supplement of £1.50 to £4 per ton being added for the developing

<sup>1</sup> Under Article 6 (13), (14), (17) and (20).

<sup>2</sup> Bilateral agreements are in use between Cuba and U.S.S.R., and Cuba and China.

<sup>3</sup> West Indies and Guyana; East Africa.

countries<sup>1</sup> participating, to help to stabilize their economies. The agreement was first concluded in 1951 and periodically renewed, South Africa withdrawing in 1962 and Rhodesia being suspended in 1965. It was made of indefinite duration in 1968, a first triennial review being fixed for 1971.

*Quotas, prices and production.* The other three agreements combine in various ways export quotas or controls; uses of the price mechanism; control of production; and management of stocks.

Under the Sugar and Coffee Agreements basic export quotas are established for all exporting countries, with provision for necessary adjustments either quarterly or in special circumstances.<sup>2</sup> In the Tin Agreement the Council may, on certain conditions, 'declare a control period and by the same resolution shall fix a total permissible export amount for that control period', the amount being divided among producing countries according to percentages assigned in Annex A of the Agreement (Article VII-2a, 4). Controls were introduced in 1968 for the first time for ten years under the International Tin Agreements, since despite purchases of 11,000 tons by the buffer stock, the price remained on the floor. The operation of export quotas is ineffective unless a sufficiently high proportion of world trade in the commodity is covered by the agreement. Imports from non-member countries must be limited, and the origin of the consignments checked. So, for example, the Coffee Agreement requires each 'A' member to 'limit its annual imports of coffee produced in non-member countries to a quantity not in excess of its average annual imports of coffee from those countries' in 1960, 1961 and 1962; though these limitations by volume may be suspended or varied by the Council (Article 45 (1) and (2)). Further, there are elaborate provisions for certificates of origin and of re-export in accordance with Council rules (Article 43). In the adjustment of export quotas to meet changes in the market it is also difficult to distribute the burden equitably between the exporting countries, and to take account of different varieties of the commodity.

Under the Sugar and Tin Agreements world price reference points<sup>3</sup> are indicated for fixing quota levels and commitments, and for the operation of the tin buffer-stock. The Coffee Agreement does not go further than requiring that 'regional and inter-regional price arrangements between

<sup>1</sup> A 'developing member' is defined in the Sugar Agreement as 'any member in Latin America, in Africa excepting South Africa, in Asia excepting Japan and in Oceania excepting Australia and New Zealand, and includes Greece, Portugal, Spain, Turkey and Yugoslavia'. By this definition all exporting countries in the Commonwealth Sugar Agreement would be developing except Australia.

<sup>2</sup> Sugar Agreement, Articles 40, 41; Coffee Agreement, Articles 29-33. For operation of export and import quotas on *manufactured* products: see the Long-Term Cotton Textile Arrangement (1962) renewed in 1967.

<sup>3</sup> Sugar Agreement, Articles 30, 33, 48; Tin Agreement, Article VI, dividing the range between floor and ceiling prices into three sectors.

exporting countries' shall be 'consistent with the general objectives of the Agreement and registered with the Council'. But the Council 'may recommend a scale of price differentials for various grades and qualities of coffee which Members should strive to achieve through their pricing policies' (Article 41 (1) and (2)). On the management of stocks, and the related problem of the control of production, the agreements vary. Under the Coffee Agreement, 'each producing member undertakes to adjust its production of coffee to a level not exceeding that needed for domestic consumption, permitted exports and stocks' (Article 48), and the Council may by a distributed two-thirds majority 'establish a policy' relating to the management of coffee stocks. Similarly the Sugar Agreement provides for supervision of subsidies on the production or marketing of sugar (Article 50); and each exporting member undertakes to adjust sugar production to one of two alternative levels of stocks. These levels, at a fixed date immediately preceding the start of the new crop may be either 20 per cent of production in the preceding year, or 20 per cent of the basic export entitlement over and above stocks held for domestic consumption.

In the Tin Agreement, the management of stocks is related to the establishment of the buffer-stock which for its legal interest will be described more fully.

*Buffer-stocks.* Under the Tin Agreement contributions are made to the tin buffer-stock (*stock régulateur*) by producers amounting in the aggregate to the equivalent of 20,000 tons of tin metal. Contributions have to be made as to one-half in tin or cash, the remainder being on call (Article X-2a). Voluntary contributions may also be made, which are, however, refundable on request in whole or in part, subject to such conditions as the Council may impose (Article X-7). The Council may borrow money, upon the security of tin-warrants held in the buffer-stock, for purposes of operating the buffer-stock (Article X-6). Liquidation of the buffer stock (Article XIII) is to be progressive as the fixed term of the agreement draws to an end, and after liabilities are met there is to be a final redistribution to participants by shares at valuation in terms of the 'floor' price prevailing at the date of contribution.

It would be reasonable to regard the International Tin Council as a public corporate body, having proprietary rights in the buffer-stock, evidenced by capacity to operate it by purchase and sale of tin, with the accompanying issue of tin warrants. There are some analogies here with the International Monetary Fund. Its resources are composed in large part of contributions of gold and currencies of members, the latter in part on call being evidenced by non-negotiable notes. Further, the I.M.F. has under the General Arrangements to Borrow (1962) been authorized to borrow currencies as required.



How then are the proprietary rights of the International Monetary Fund over its resources, or of the International Tin Council over the tin buffer-stock, to be characterized? The notions of ownership or *dominium* are only approximate descriptions of the legal relationship between persons and property, and the component rights must be identified in particular cases.

Characteristic rights of property in a thing are the right to consume or use it in its entirety; to alienate it to another as by gift or sale, or to pledge it as security; to transfer it to another for use, as by loan or lease; and to dispose of it *mortis causa*. Any one of these rights would appear to involve ownership, and though they are normally held in combination, each of them may be restricted or taken away by law.

The I.M.F. and the International Tin Council may be said to have the second, third and last rights, if we replace 'death' by 'liquidation', though the exercise of both rights is limited by agreed rules. The Fund has not yet pledged any assets as security, and did not undertake to do so in the General Arrangements to Borrow, but there appears to be no obstacle to its doing so if it were necessary.

Incomplete analogies may be found between the proprietary rights of the I.M.F. in its resources, or of the International Tin Council in the buffer-stock, and the English charitable trust, the German *Gemeinschaft*, the French *fondation*, and the rights of companies in many systems.

The effectiveness of the buffer-stock has been limited by its vulnerability to speculative buying, the difficulty of financing it and the costs of storage, and its being not large enough to have a speedy and decisive influence on price movement. In recent years the price has moved close to, and even above the ceiling, and the buffer-stock has on one occasion been exhausted. A further element of instability, controlled by special agreement, has been the United States strategic stockpile of tin, amounting in April 1969 to 232,000 tons or about 130 per cent of annual world consumption. The United States, not being a participant in the second International Tin Agreement, agreed with the International Tin Council in October 1966 that it would not release tin from the stockpile on to the world market at competitive prices, and would give due notice of such release under Article XVIII of the Agreement.<sup>1</sup>

## VI ·

The enforceability of these commodity agreements depends materially upon their continuing to meet an organic economic need of the participants, and formally upon decisions rendered by the Council, backed by certain sanctions in the agreements, and legislative or administrative action by participants on the national plane.

<sup>1</sup> Compare U.N. General Assembly Resolution 2158-XXI, paragraph 7.

In three of the agreements there is a common provision that the participants undertake to accept as binding decisions of the Council<sup>1</sup> and in the Wheat Convention the need 'to adopt such measures as are necessary to enable them to fulfil their obligations under the Agreement' is made express.<sup>2</sup> Several forms of sanction are represented: suspension of voting or other rights,<sup>3</sup> ineligibility to benefit from quota reallocations, forfeiture of rights in liquidation of the buffer-stock<sup>4</sup> or exclusion from further participation.<sup>5</sup>

Provision for the settlement of disputes is now made in a broadly uniform clause in all the agreements.<sup>6</sup> The central feature of these clauses is that the mode of settlement is internal, that is to say, ultimately by Council decision, though provision is made for obtaining the opinion of an advisory panel, if a majority of countries or countries holding one-third of the votes so require. In the Coffee, Tin and Wheat Agreements certain breaches of obligations or disputes are removed from the scope of the general settlement of disputes clause, provision being made for remedies or settlement elsewhere in the agreements. In the Coffee Agreement a special reference to arbitration may be made of complaints as to 'discriminatory treatment in favour of processed coffee as compared with green coffee'.<sup>7</sup> The determination of the issue by the arbitral panel is final and the member concerned must, if discriminatory treatment has been found, correct the situation in accordance with the conclusions of the panels.

An arbitral panel was established under this clause to deal with a complaint by the United States of discriminatory treatment in Brazilian regulations in favour of Brazilian manufactures of processed or soluble coffee.<sup>8</sup> The three members of the panel took an idiosyncratic view of their functions, which may have been realistic in face of a sharp trade conflict but was hardly compatible with Article 44. First, the panel made no actual determination, as required by Article 44 (2) *f*, if necessary by majority vote. Instead three separate opinions were presented, tactfully described as 'the results of the recent arbitration' in the subsequent exchange of letters. Secondly, while the Brazilian member found no discriminatory treatment, the United States member and the Swedish member, more circuitously, did so, and proceeded to consider remedies (which Article 44 did not authorize

<sup>1</sup> Sugar Agreement, Article 11 (3); Coffee Agreement, Article 14 (3); Wheat Convention, Article 29 (2). A number of decisions by the Coffee Council may be taken, by delegation under Article 17, by the Executive Board, including decisions on disputes. Similar delegation of powers may be made by the Sugar Council to its Executive Committee: Article 16.

<sup>2</sup> Article 25 (1).

<sup>3</sup> e.g. Sugar Agreement, Article 46 (2), 58 (3).

<sup>4</sup> Article VII-9*d*.

<sup>5</sup> Wheat Convention, Articles 20 (3), 22 (7); Coffee Agreement, Article 67.

<sup>6</sup> Sugar Agreement, Article 57; Wheat Convention, Article 22; Coffee Agreement, Article 59; Tin Agreement, Article XX.

<sup>7</sup> Article 44.

<sup>8</sup> See *International Legal Materials*, 8 (1969), p. 564 (for text of the arbitral opinions) and p. 579 (exchange of letters between U.S. and Brazil on a proposed solution).

them to do) and to justify United States counter-measures in terms inconsistent with Article 44 (3), which permits the necessary counter-measures to be taken only when the member responsible for discriminatory treatment has failed to correct the situation. The United States member brushed aside these 'technical questions' as he called them, saying that two of the arbitrators had in effect found discriminatory treatment and 'have concluded that action by the United States under Article 44 (3) is the best remedy for this type of situation in these circumstances'. The Swedish member agreed that 'it would not be constructive to raise procedural obstacles on account of the form of this award'.

It would be easy to be sarcastic about the award and its reasoning, but it must be set in the context of how the settlement of disputes is seen in international organizations in the monetary and trade fields. Settlement is regarded as essentially a matter for negotiation by the interested parties, which may comprise all members of the organization, a process of what has been well called 'organized persuasion', rather than arbitral or judicial decision.



# THE MEANING OF DISCRIMINATION IN INTERNATIONAL AND MUNICIPAL LAW\*

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TRADITIONAL international law did not concern itself with discrimination except as an element to be taken into consideration in determining the legality of a State's treatment of foreigners. It is true that in the course of history a considerable number of peace treaties sought to provide guarantees of religious freedom and thereby to protect particular religious minorities from discriminatory treatment. It is also true that there were a few cases of 'humanitarian' intervention collectively by a number of States to put a stop to wholesale atrocities committed by a State against a particular minority. In general, however, traditional international law did not set out to regulate a State's treatment of its own nationals and was, in consequence, indifferent as to whether or how a State might discriminate against a particular ethnic, religious or other group amongst its peoples. After the First World War the redrawing of European frontiers and the introduction of the mandate system for the territories detached from Germany and Turkey was accompanied by a more systematic attempt to provide international guarantees for the protection of particular minorities. At the same time feminist movements were beginning to make the inequality of the sexes a matter of international concern at the League of Nations, more especially in the International Labour Organization and in the Inter-American Organization. Even so, prior to the United Nations Charter the notion of non-discrimination as a general principle of international law remained a remote prospect. The racial atrocities of the Nazi regime, however, led to repeated emphasis being placed in the Charter on the principle of non-discrimination in the enjoyment of human rights and freedoms; and in subsequent years the anti-colonial campaign and racial problems in various parts of the world, especially in the United States, have combined to make non-discrimination one of the great issues of our day. In consequence, the legal content of the principle of non-discrimination has today become a matter of the first importance to lawyers, both national and international.

In ordinary language, 'discrimination' has more than one meaning. It can be used neutrally to mean 'distinction' or 'differentiation' *simpliciter*, or in the complimentary sense of an accurate or discerning distinction. On the

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other hand, 'to discriminate against' has always meant 'to make an adverse distinction'.<sup>1</sup> But the word 'discriminate' alone is also commonly used in the restricted sense of an unfair, improper, unjustifiable or arbitrary distinction, and it is this meaning that has come to be employed in international law.<sup>2</sup>

After the First World War various proposals were made to include provisions on equality and discrimination in the Treaty of Versailles but were all rejected.<sup>3</sup> Instead the Minorities Treaties contained provisions prohibiting discrimination on the grounds of race, language and religion, and also guaranteeing certain educational, linguistic, religious and traditional rights so that there might be 'equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law'.<sup>4</sup> Thus certain special rights were accorded to minority groups in order that they might enjoy a real and genuine equality, and such differential treatment was not considered to have been forbidden by the non-discrimination clauses.

The debates of the League Assembly showed a gradual disenchantment with the League Minority System and a movement developed to encourage the universal protection of human rights. It was hoped that all persons everywhere might benefit from the principle of non-discrimination and that everyone might be able to enjoy basic human rights without discrimination. Several references to these principles were included in the United Nations Charter.<sup>5</sup> Article 1 (3) elevated the promotion of human rights and fundamental freedom without distinction as to race, sex, language or religion to become a major purpose of the Organization. One delegate in the Third Committee of the General Assembly went so far as to say that the United Nations 'had been founded principally to combat discrimination in the world'.<sup>6</sup> No clause was included specifically for the protection of minorities since it was believed that the League Minority System had not been successful and that, in any case, the interests of minority groups would be adequately safeguarded by the faithful observance of the principle of non-discrimination. Nevertheless, at its second session, the Economic and Social Council empowered the Commission on

<sup>1</sup> See the definitions of discrimination in the *Oxford English Dictionary*; also in the *Shorter Oxford English Dictionary* (3rd edn.).

<sup>2</sup> The *Random House Dictionary of the English Language* (New York) defines the verb 'to discriminate' as 'to make a distinction in favour of or against a person or thing on the basis of the group, class or category to which the person or thing belongs rather than according to actual merit'.

<sup>3</sup> A. Zimmermann, *The League of Nations and the Rule of Law, 1918-35* (1936).

<sup>4</sup> See the Advisory Opinion concerning the *Settlers of German Origin in Poland*, *P.C.I.J.*, Series B, No. 6 (1923), p. 24; also the Advisory Opinion on *Minority Schools in Albania*, *ibid.*, Series A/B, No. 64 (1935), p. 19.

<sup>5</sup> Articles 1 (3), 13, 55, 56, 62 (2), 68, 76 (3) and the Preamble.

<sup>6</sup> U.N. Doc. A/C3/SR 100, p. 7 (the Chilean delegate).

Human Rights to set up the Subcommission on the Prevention of Discrimination and Protection of Minorities.<sup>1</sup> During its first session the subcommission attempted to define 'prevention of discrimination' and 'protection of minorities'. It suggested that 'prevention of discrimination' might be defined as the prevention of any action that denies to individuals or groups of individuals equality of treatment for which they may wish, and 'protection of minorities' as the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve the basic characteristics which they possess and which distinguish them from the majority of the population. Differential treatment of groups or individuals was justifiable when exercised in the interests of their contentment and the welfare of the community as a whole.<sup>2</sup>

The Subcommission also approved an important memorandum issued by the United Nations Secretary-General on the meaning of the two phrases.<sup>3</sup> *Inter alia* the memorandum stated that discrimination means any act or conduct which denies to certain individuals equality of treatment with other individuals because they belong to certain social groups. In order to prevent discrimination some means must be found to suppress or eliminate inequality of treatment which may have harmful results, aiming at the prevention of acts which imply that an unfavourable distinction is made between individuals solely because they belong to certain categories or groups. 'Discrimination' is limited to any conduct based on a distinction made on grounds of natural or social categories which have no relation either to individual capacities or merits or to the concrete behaviour of the individual person.

In the Subcommission's view a clear distinction existed between 'differentiation' which may be justified in the interests of true equality,<sup>4</sup> and 'discrimination' which is never justified. In this context 'discrimination' means 'unwanted, unreasonable, arbitrary or invidious differences'.

Similarly, during the drafting of the Universal Declaration of Human Rights, a proposal in the Commission on Human Rights to qualify the word 'discrimination' by 'arbitrary' was rejected, principally on the grounds that 'discrimination' already meant 'invidious distinction' and had the derogatory meaning of 'unfair, unequal' treatment.<sup>5</sup> The question was

<sup>1</sup> *United Nations Yearbook* (1946), p. 528. This Subcommission will hereinafter be referred to as 'the Subcommission'.

<sup>2</sup> *Economic and Social Council (E.C.O.S.O.C.), Official Records*, Sixth Session, Supp. No. 11; U.N. Doc. E/CN4/52, pp. 10-11.

<sup>3</sup> U.N. Doc. E/CN4/Sub. 2/40.

<sup>4</sup> The meaning of 'equality' in this context is to some extent the obverse of 'discrimination'. It is not, however, proposed to discuss it in the present article. A book on the equality of individuals under international law by the present writer is under preparation by the Clarendon Press.

<sup>5</sup> U.N. Docs. E/CN4/S.R. 52, pp. 6-17; E/CN4/S.R. 53, pp. 2, 5-10; E/CN4/S.R. 54, pp. 2-3, in particular the views of Cassin, Pavlov and Chang.



dealt with in greater detail in the Subcommittee's studies on types of discrimination, and a number of general principles can be deduced from the work of the special rapporteurs responsible for preparing the studies:

1. It was generally agreed that the term 'discrimination' is not synonymous with 'differential treatment' or 'distinction'. Rather, in the sense used in the studies, 'discrimination' means some sort of distinction made against a person according to his classification into a particular group or category rather than by taking into account his individual merits or capacities.<sup>1</sup>

2. In order to constitute discrimination, the distinctions, exclusions or limitations made on the basis of such classifications must be adverse to the interests of the particular individual and unwanted by him.<sup>2</sup>

3. No undue preferences should be given to individuals because of such classifications.<sup>2</sup>

4. Distinctions, exclusions or limitations are not discriminatory if they are reasonable or justified in the circumstances.<sup>3</sup>

5. Certain distinctions are legitimate if they are special measures designed to achieve rather than to prevent equality in the enjoyment of rights.<sup>4</sup>

6. However, such special measures are only legitimate if they are temporary, i.e. if they are not applied for a longer period than is necessary to redress the *de facto* inequality between groups due to the economic,

<sup>1</sup> In his *Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres*, Mr. Santa Cruz adopts the definition of the verb 'to discriminate' which appears in the *Random House Dictionary of the English Language*: see above, p. 178 n. 2, and U.N. Doc. E/CN.4/Sub. 2/288 (25 July 1968), p. 44. In the *Study of Discrimination in Religious Rights and Practices*, Mr. Krishnaswami states that 'in this field more than any other, differential treatment meted out to individuals and groups is not always synonymous with discrimination'. U.N. Doc. E/CN.4/Sub. 2/200 (9 November 1959), p. 5. See also the *Study of Equality in the Administration of Justice* (draft); U.N. Doc. E/CN.4/Sub. 2/289 (15 July 1968), p. 94.

<sup>2</sup> *Study of Discrimination in the Matter of Political Rights*, U.N. Doc. E/CN.4/Sub. 2/213 (9 November 1961), p. 28, and the *Study of Discrimination Against Persons Born Out of Wedlock*, U.N. Doc. E/CN.4/Sub. 2/275 (7 November 1966), p. 25, which refers to 'discriminating distinctions'.

<sup>3</sup> Thus the disqualification from the exercise of political rights of aliens, of nationals who have not yet reached the age specified by law, or of insane persons is not normally considered to be discriminatory (see the *Study of Discrimination in the Matter of Political Rights*, U.N. Doc. E/CN.4/Sub. 2/213, para. 117, p. 44). If unjustified distinctions of any kind prevent the full enjoyment of a right, such distinctions are discriminatory (see the *Study of Discrimination in the Right of Everyone to Leave any Country*, U.N. Doc. E/CN.4/Sub. 2/220, p. 23). In the view of Mr. Saario, most differences between the status of persons born in and out of wedlock are discriminatory in nature (see the *Study of Discrimination Against Persons Born out of Wedlock*, U.N. Doc. E/CN.4/Sub. 2/265, p. 29).

<sup>4</sup> Thus it is legitimate to provide special education for a separate population group in its own language or in accordance with its own cultural traditions, and to provide special measures for blind, deaf, disabled or otherwise physically or mentally handicapped persons, and, conversely, for specially gifted persons (the *Study of Discrimination in Education*, U.N. Doc. E/CN.4/Sub. 2/181, para. 51, p. 24).

social and cultural conditions prevailing before the adoption of the measures.<sup>1</sup>

7. It is not necessary for a discriminatory motive to exist if discrimination exists in fact, although *mala fides* obviously aggravates a discriminatory practice and is much more to be condemned.<sup>2</sup>

8. Some limitations, distinctions or restrictions although appearing legitimate and non-discriminatory *prima facie*, may in fact affect only a particular group or affect it to a greater degree than others. This consideration should be taken into account in determining whether a particular limitation, distinction or restriction is legitimate.<sup>3</sup>

9. The list of impermissible distinctions in Article 7 of the Universal Declaration of Human Rights is illustrative and not exhaustive.<sup>4</sup>

10. Neither the Universal Declaration nor any United Nations pronouncement establishes the priority of one right over another so that the principles of equality and non-discrimination are not to be denied in order to express other rights.<sup>5</sup>

11. The principle of non-discrimination does not exclude the possibility of differentiations based on merit, physical or mental capacity, talent or innate ability but is primarily concerned with differentiations based on factors over which the individual has no control such as race, colour, descent and national or ethnic origin.<sup>6</sup>

The importance of these studies in contributing to the understanding of the meaning of the principle of non-discrimination cannot be

<sup>1</sup> See, e.g., *ibid.*

<sup>2</sup> *Ibid.*, paras. 63–6, pp. 27–8. Although the use of the adjectives ‘static’ and ‘active’ to qualify ‘discrimination’ had been discarded by the special rapporteur, in his view the terms did indicate tendencies. Discriminatory practices due to economic, social, political and historical factors were much more widespread than practices resulting from a deliberate policy of discrimination. Nevertheless, a deliberate policy was never conducted in a vacuum but always as a result of such factors. Moreover, it was difficult to determine the existence of such deliberate intention. Did it, for instance, lie solely in positive measures or could it also be discerned in negligence, inaction or delay in taking positive steps to combat discriminatory practices? Discrimination is defined as acts having a certain ‘purpose or effect’ in Article 1 of the Convention on the Elimination of all Forms of Racial Discrimination, 1965, and in Article 1 of the Draft Convention on the Elimination of all Forms of Religious Intolerance (see U.N. Doc. A/7177, Annex III).

<sup>3</sup> *Study of Discrimination in Religious Rights and Practices*, U.N. Doc. E/CN4/Sub. 2/200, para. 45, p. 32: ‘Only when public authorities refrain from making any adverse distinctions against or giving undue preferences to individuals or groups, will they comply with their duty as concerns non-discrimination.’

<sup>4</sup> *Study of Discrimination in the Matter of Political Rights*, U.N. Doc. E/CN4/Sub. 2/213, paras. 26–7, p. 15; and the *Study of Discrimination Against Persons Born Out of Wedlock*, U.N. Doc. E/CN4/Sub. 2/265, p. 25.

<sup>5</sup> *Ibid.*, p. 27. See also Article 30 of the Universal Declaration of Human Rights. In addition Article 29 of the Declaration provides that only reasonable limitations may be imposed on the exercise of the rights and freedoms enumerated therein.

<sup>6</sup> *Study of Discrimination in Political, Economic, Social and Cultural Spheres*, U.N. Doc. E/CN4/Sub. 2/288, paras. 46–8: ‘Racial Discrimination is the very negation of the principle of equality, and therefore an affront to human dignity.’ (To the natural differences mentioned above, might be added differences of opinion and belief, such as religious and political opinions.)

overestimated, and they have had a profound influence on the Subcommittee's work in preparing preliminary drafts on conventions on various types of discrimination.<sup>1</sup>

The United Nations Committee on Information from Non-Self-Governing Territories has also produced some excellent analyses of the nature of discrimination.<sup>2</sup> At its seventieth meeting, the Indian representative pointed out the fundamental distinction between discriminatory laws and protective measures designed to safeguard the rights of indigenous inhabitants.<sup>3</sup> The committee classified existing laws as differential or concessionary, and protective and discriminatory. By differential or concessionary legislation it meant those laws which reflect the different religious, traditional and cultural aspirations of the different communities and which originate with and are maintained by the will of the particular communities concerned.<sup>4</sup> Protective legislation might also be necessary but it required frequent reconsideration, since, with the evolution of society, it might degenerate into discrimination.<sup>5</sup> In the General Assembly's Fourth Committee there was a clear acceptance of this view,<sup>6</sup> and it was eventually incorporated in the General Assembly Resolution 644 (VII).<sup>7</sup> A similar position was adopted at the 1968 United Nations Seminar on Racial Discrimination.<sup>8</sup> These various investigations of the content of the principle of non-discrimination all stress the difference between discrimination and legitimate distinctions and the importance of special measures of protection.

A substantial number of conventions have now been drafted on different types of discrimination despite the opposition of some States which would have preferred mere recommendations. These can be classified in several ways. First, some conventions require immediate application while some are merely promotional, i.e. they envisage the progressive implementation of their provisions. Others are mixed in that some clauses require immediate implementation while others are to be applied as circumstances permit.<sup>9</sup>

<sup>1</sup> e.g. the U.N.E.S.C.O. Convention on Discrimination in Education, 1960, and the draft Convention on the Elimination of all Forms of Religious Intolerance. See U.N. Docs. A/6660, A/6404, A/6934 and A/7177.

<sup>2</sup> See the *Report of the Committee*, U.N. Doc. A/2219, Part III, and Part I, Annex B.

<sup>3</sup> U.N. Doc. A/AC35/S.R., p. 70 (20 October 1952).

<sup>4</sup> U.N. Doc. A/2219, Part III, para. 26, p. 53.

<sup>5</sup> *Ibid.*, para. 29, p. 53.

<sup>6</sup> U.N. Docs. A/C4/S.R. 260-2, and A/2296.

<sup>7</sup> Para. 5. This resolution was adopted at the General Assembly's 402nd plenary meeting on 10 December 1952.

<sup>8</sup> U.N. Doc. ST/TAO/HR 34. See also the *Seminar on the Multi-National Society* (U.N. Doc. ST/TAO/HR 23) and the *Seminar on Apartheid* (U.N. Doc. ST/TAO/HR 27).

<sup>9</sup> An example of the first category is the Convention on Genocide, 1946; examples of the second category are the I.L.O. Conventions on Equal Pay for Work of Equal Value, 1951, and Discrimination in Employment and Occupation, 1958, the Convention on the Political Rights of Women, 1953, the U.N.E.S.C.O. Convention on Discrimination in Education, 1960, and the Covenant on Economic, Social and Cultural Rights, 1966. Examples of the third category include the Convention on the Elimination of all Forms of Racial Discrimination, 1965, and the Covenant on Civil and Political Rights, 1966.



Some conventions deal with discrimination on one particular ground<sup>1</sup> while others deal with discrimination on a number of grounds in a particular field.<sup>2</sup>

Examined chronologically, the conventions demonstrate a growing sophistication in their treatment of the nature of discrimination. In most recent conventions discrimination involves the combination of three elements:

- (1) a distinction, exclusion, restriction or preference;
- (2) which is based on one of the specified grounds (e.g. race, colour, descent, national or ethnic origin); and
- (3) which has the purpose or effect of nullifying or impairing equality of treatment.

The Racial Discrimination Convention of 1965, the most recent convention dealing specifically with discrimination, goes further and provides in Article 1 (4) that special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring protection in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed to be racial discrimination, provided that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups,<sup>3</sup> and do not continue after the objectives for which they were taken have been achieved.<sup>4</sup> Thus certain measures designed to assist deprived groups are not to be considered discriminatory even if they allow more 'favourable' treatment than that accorded to the rest of the population.

In his dissenting judgment in the *South-West Africa* cases (Merits),<sup>5</sup> Judge Tanaka firmly distinguished between discriminations and differentiations in the human rights context. In their pleadings, the Applicants, Liberia and Ethiopia, had claimed the existence of a norm and/or standards of non-discrimination under international law, and objected that the respondent had repeatedly misinterpreted their position by referring to alleged norms of non-differentiation.<sup>6</sup> It is obvious that a rule of non-differentiation would be untenable, and by putting the argument in those terms, South Africa attempted to demonstrate a *reductio ad absurdum*. If mere differences in treatment were illegal then the differences permitted under the Minorities Treaties and even separate conveniences for men and

<sup>1</sup> e.g. the Racial Discrimination Convention, 1965.

<sup>2</sup> e.g. the Convention on Discrimination in Education, 1960.

<sup>3</sup> This proviso was added to make it clear that any 'separate but equal' doctrine like that espoused in *Plessy v. Ferguson* 163 U.S. 537 (1893) was impermissible.

<sup>4</sup> Article 2 (2) of the Convention requires the parties to take special concrete measures to ensure the adequate development and protection of certain deprived racial groups.

<sup>5</sup> *I.C.J. Reports*, 1966, p. 4.

<sup>6</sup> See *South-West Africa* cases, *I.C.J. Pleadings*, Rejoinder, vol. 1, p. 145, and C.R. 65/31, p. 13.

women would indeed be illegal.<sup>1</sup> According to Judge Tanaka, differences in treatment are legally justified to the extent that they are just and reasonable.<sup>2</sup> Judge Tanaka did, however, take the view that *any* distinction made on the basis of race is contrary to the principle of non-discrimination, 'the reverse side of the notion of equality before the law', and this is no doubt true where racial groups are treated *qua* racial groups with regard to use of public facilities and accommodation. Nevertheless, it is suggested that in situations where individuals have previously been significantly disadvantaged on racial grounds, they may require temporary ameliorative measures as a racial group.<sup>3</sup>

In 1956 Professor Sorensen pointed out that discrimination denoted only distinctions which were detrimental to the individual in question, and that more favourable treatment was not discrimination unless it involved to the granting of privileges to some groups to the detriment of others and thereby amounted to discrimination against those latter groups. Furthermore, discrimination comprised only such detrimental distinctions as were based upon the membership of individuals in social or other groups, and was not generally applicable to distinctions based on individual qualities.<sup>4</sup> This attitude was adopted by the General Assembly's Third Committee when it drafted Article 2 (2) of the Covenant on Economic, Social and Cultural Rights.<sup>5</sup> The original draft of this clause had used the word 'distinction' rather than 'discrimination'<sup>6</sup> but the latter term was substituted by the committee on the ground that discrimination meant 'unjustified differential treatment'.<sup>7</sup>

It is unfortunate that no proper definition of discrimination was included in the Covenants; the treatment of the concept is more primitive than that employed during the drafting of the Racial Discrimination Convention of the previous year.<sup>8</sup> Nevertheless, the Covenant on Civil and Political Rights does contain an article providing that minorities should be entitled to

<sup>1</sup> *I.C.J. Reports*, 1966, p. 307.

<sup>2</sup> *Ibid.*, p. 309.

<sup>3</sup> See below, p. 187 n. 7.

<sup>4</sup> M. Sorensen, 'The Quest for Equality', *International Conciliation*, 507 (1956), p. 291. He went on to say that although from a sociological point of view, it might not be justifiable to classify women or men as specific social groups, detrimental and differential treatment on such a ground is usually characterised as discrimination, since it meant denying to an individual an equality which he ought to enjoy according to accepted social evaluations.

<sup>5</sup> U.N. Doc. A/5365, pp. 13-23.

<sup>6</sup> U.N. Docs. E/2573, Annex 1A; A/5000, pp. 56-61.

<sup>7</sup> U.N. Docs. A/C3/L. 1028/Rev. 1 and Rev. 2; A/C3/S.R. 1181-5, 1202-7. (Curiously, in the corresponding article in the Convention on Civil and Political Rights the word 'distinction' was retained, despite the valiant efforts of Mr. Capotorti (Italy); see U.N. Docs. A/C3/S.R. 1257-9. It is submitted that the arguments in favour of retaining 'distinction' were not as cogent as those adduced by the committee the previous year in favour of 'discrimination'. A principal reason for the volte face was undoubtedly the fact that the personnel of the Committee had largely changed since 1962).

<sup>8</sup> Although the Covenants postdate the 1965 Convention, in fact the drafting of the relevant parts of the Covenants preceded that of the Convention.

establish and maintain their own schools, churches and cultural institutions,<sup>1</sup> thus tacitly conceding that certain groups in the community are entitled to differential treatment which is not caught in the prohibition of discrimination.

The European Convention on Human Rights, 1950, does not provide a general right not to be discriminated against, but only the right not to be discriminated against in respect of those rights and freedoms set forth in the Convention (Article 14).<sup>2</sup> Certain propositions are clearly established:

- (1) Discrimination on any ground as regards the enjoyment of the rights and freedoms set out in the Convention is prohibited;<sup>3</sup>
- (2) not all differentiations are necessarily discriminatory;<sup>4</sup>
- (3) Article 14 has an autonomous operation, and a simultaneous breach of another article of the Convention is not required.<sup>5</sup>

One of the most important cases to be decided by the European Court of Human Rights has been the *Belgian Linguistics* case.<sup>6</sup> For present purposes the importance of the case is to be found in the judgment on the merits, where the Court described 'discriminations' as unjustified or arbitrary distinctions.<sup>7</sup> Both the majority judgment and the joint dissenting opinion accepted that several propositions were well founded in respect of permissible distinctions under Article 14:

- (1) the distinction made must pursue a legitimate aim;
- (2) the distinction must not lack an 'objective justification';
- (3) Article 14 is violated when it is clearly established that no reasonable relationship of proportionality exists between the means employed and the aim sought to be realized.<sup>8</sup>

Thus, it is clear that in international legal usage, 'discrimination' has come to acquire a special meaning. It does not mean any distinction or differentiation but only arbitrary, invidious or unjustified distinctions,

<sup>1</sup> Article 27. And see also Articles 14 and 24.

<sup>2</sup> Article 14 states: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

<sup>3</sup> The words 'such as' show that the types of discrimination mentioned are merely illustrative examples.

<sup>4</sup> Some of the first cases to arise under Article 14 concerned discrimination on the grounds of sex. The applicants complained to the European Commission on Human Rights that the punishment of male but not of female homosexuals contravened Article 14. (See Applications 104/55, 167/56, 261/57; *Yearbook of the European Convention on Human Rights*, vol. 1, pp. 235, 255, 228.) However, the Commission held that Article 8 (2) which allows interference with family and private life for the protection of health or morals did not exclude the possibility of differentiating between the sexes. (This is an example of a permissible differentiation.)

<sup>5</sup> See *Grandrath v. Federal Republic of Germany*, Application No. 2299/64. The Report of the Commission was adopted on 12 December 1966. See also the *Belgian Linguistics* case.

<sup>6</sup> European Court of Human Rights, case *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits), judgment of 23 July 1968.

<sup>7</sup> *Ibid.*, pp. 34, 35 (paras. 10 and 12).

<sup>8</sup> *Ibid.*, pp. 34, 35, 89, 90.



unwanted by those made subject to them. Moreover, it does not forbid special measures of protection designed to aid depressed groups, classes or categories of individuals, so long as these special measures are not carried on longer than is reasonably necessary. The preservation of linguistic, cultural and religious facilities for minority groups is also consistent with the non-discrimination principle.

In this respect, the definition accepted in the international sphere is more advanced and sophisticated than that adopted in most municipal legal systems. This is an important instance of international law and the work of international institutions providing inspiration for municipal law, and a reversal of the usual situation whereby international law adapts principles of municipal law by analogy to deal with international problems. There has, however, been little readiness for municipal legal systems to adopt and use the international definition of discrimination, the content of which has been elucidated by over fifty years of research and discussion.

In municipal statute law, whenever the term 'discrimination' has been employed, it has usually been qualified by an adjective such as 'improper' or 'undue'.<sup>1</sup> Similarly, in older decisions the judges have tended to use the phrase 'discriminate against' in the sense of an unjustified distinction or differentiation while 'discriminate' used alone or in a phrase such as 'discriminate between' generally means a mere differentiation without pejorative overtones.<sup>2</sup> In some judgments, however, 'discrimination' has been used interchangeably with 'differentiation' in one part of the decision and in another part in the sense of 'unjustified differentiation'.<sup>3</sup> In the United States the courts and commentators have often used 'discrimination' in the sense of 'mere differentiation' and have consequently been obliged to use qualifications such as 'arbitrary', 'unjust', 'irrelevant', 'unreasonable', 'irrational' or 'invidious'<sup>4</sup> in cases involving the equal protection clauses of the constitution.<sup>5</sup>

In the 1949 Annotation on Discrimination to the United States Supreme Court Reports it is stated:

Discrimination is here used in its broadest sense and includes any differential treatment whether of equal quality or not which may have been accorded to a member of a

<sup>1</sup> See, e.g., s. 37 (8) of the Electricity Act (U.K.), 1947, which includes the phrase 'undue discrimination'. S. 19 (1) (b) of the Parliamentary Commissioner (Ombudsman) Act (N.Z.), 1962, employs the term 'improperly discriminatory'. <sup>2</sup> See above, p. 178 n. 1.

<sup>3</sup> *South of Scotland Electricity Board v. British Oxygen Co.*, [1956] 1 W.L.R. 1069 (H.L.); [1959] 1 W.L.R. 587, which involved the interpretation *inter alia* of 'undue discrimination' in s. 37 (8) of the Electricity Act (U.K.), 1947. Cf. *Elliott v. The Commonwealth* (1935-36), 54 C.L.R. 657, where the High Court of Australia considered Articles 51 (II) and 99 of the Australian Constitution.

<sup>4</sup> e.g. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1953); *Morey v. Doud*, 354 U.S. 457 (1957); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 674.

<sup>5</sup> i.e. the equal protection clause in the Fourteenth Amendment to the United States Constitution. (Cf. Article 14 of the Indian Constitution.)

particular race by virtue of his membership in that race and which has been made the subject of litigation coming before the Supreme Court.<sup>1</sup>

Nevertheless, this statement tacitly acknowledges that discrimination does possess a more restrictive usage, and the same year two American commentators warned that 'discrimination' possessed two meanings which should not be confused.<sup>2</sup> In one sense, to exercise discrimination was simply to be discerning, to be quick at recognizing differences, to be cognitively alert. In the second sense, discriminatory action was action which was biased, prejudiced or unfair. Legislators should be discriminatory in the first sense in that they must discern and recognize relevant distinctions and differences, i.e. they must classify reasonably. However, the type of discrimination forbidden by the equal protection clause was that suggested by the second sense of the term. Although the confinement of the legal meaning of discrimination to the sense of unjustifiable differentiation has been attacked,<sup>3</sup> it would now appear to be gaining acceptance in the United States.<sup>4</sup>

It has recently been suggested that compensatory treatment to assist Negroes in the United States by means of special quotas and reservations would be fully consistent with the equal protection clause.<sup>5</sup> Harlan J.'s famous remark in his dissenting judgment in *Plessy v. Ferguson*<sup>6</sup> that 'the Constitution is colour-blind' should not be interpreted as prohibiting ameliorative measures for Negroes since there is a substantial difference between harming someone because of an irrelevant characteristic and helping someone because of a relevant characteristic, even though the characteristic be the same in both instances. Negroes, it has been said, must be assisted as Negroes, just as they have been disadvantaged as Negroes, if the Fourteenth Amendment is to serve its egalitarian purpose, just as women, children and veterans have special laws for their protection.<sup>7</sup> The draft

<sup>1</sup> *United States Supreme Court Reports* (2nd Lawyers edn., 1949), vol. 4, p. 1121.

<sup>2</sup> See J. Tussman and J. ten Broek, 'The Equal Protection of the Laws', *California Law Review*, 37 (1949), pp. 341, 358 n. 35.

<sup>3</sup> See, e.g., J. S. Williams, *Mulkey v. Reitman and State Action*, *U.C.L.A. Law Review*, 14-1 (1966-7), pp. 26, 31: 'Individuality consists in part of discrimination. We used to refer to a person of quality and sensible tastes as being a discriminating individual. This was a very apt description. He discriminated in favour of good literature, sensible political doctrine, quality friendships and the like. He showed good judgment. When the discretion to discriminate is taken away, individuality is gone. . . .'

<sup>4</sup> See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); also *Ohio State Law Journal*, 22 (1961), p. 213; *Louisiana Law Review*, 21 (1961), p. 676.

<sup>5</sup> See the important symposium, *Equality* (ed. by R. L. Carter, 1965), particularly the articles by R. L. Carter, D. Kenyon, P. Marcuse and L. Miller, and the foreword by C. Abrams. See also R. Lichtman, 'The Ethics of Compensatory Justice', *Law in Transition Quarterly*, 1 (1964), p. 76.

<sup>6</sup> 163 U.S. 537, 559 (1895).

<sup>7</sup> There would not appear to be anything necessarily improper in the notion of a racial quota as such, so long as it is used as a classification for the purpose of introducing special temporary measures. Quotas and reservations have long been employed in India to give affirmative assistance to backward classes disadvantaged because of natural, social and economic circumstances. This policy has been considered legitimate by the International Law Commission's Committee



Model Anti-Discrimination Act prepared by the National Conference of Commissioners on Uniform State Laws includes provisions allowing compensatory treatment for Negroes, and has been welcomed by several commentators.<sup>1</sup> The constitutionality of protective measures for disadvantaged sections of the community has not yet been fully canvassed before the Supreme Court although several cases appear to foreshadow a favourable response.<sup>2</sup>

That the question involves matters of principle and not mere semantic quibbles is well illustrated in a recent article on the Malaysian Constitution, where it was claimed that a blanket prohibition of discrimination would have the adverse effect of precluding the State from taking ameliorative measures to remove the disabilities of the depressed classes.<sup>3</sup>

It is suggested that if the definition of discrimination contained in Article 1 of the 1965 Racial Discrimination Convention<sup>4</sup> were to be generally adopted, then these difficulties would disappear. Discrimination is something quite different from differentiation, and by definition certain ameliorative measures are not discriminatory. Apart from the United States Civil Rights Acts, one of the most important instruments in recent years designed to prohibit racial discrimination in municipal law has been the United Kingdom Race Relations Act, 1968. The original Race Relations Act of 1965 did not contain a definition of discrimination but one was included in the 1968 measure. Unfortunately, this definition is defective and liable to give rise to considerable problems in the courts. As Dr. St. John-Stevas pointed out in the Commons Debate, 'there is only one thing worse than a lack of definition and that is a misleading and ambiguous one'.<sup>5</sup>

No definition of discrimination was included in the original bill which merely provided that 'discriminate' means 'discriminate on the grounds of

of Experts. See *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III, Part IV, I.L.C. 47th Session 1963, Geneva, Part III, para. 39.

<sup>1</sup> e.g. N. Dorsen, 'The American Law on Racial Discrimination, in *Public Law* (1968), p. 304; and Auerbach, *Minnesota Law Review*, 52 (1967), pp. 272-8, 321.

<sup>2</sup> See, e.g., *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (a poll tax case) and *Douglas v. California* 372 U.S. 353 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956); and *Anders v. California*, 386 U.S. 738 (1967) (the indigent litigant cases). Another indication of the Supreme Court's attitude may be gleaned from *Reitman v. Mulkey*, 18 L. ed. 2d. 830, a case involving Proposition 13, an amendment to the Californian State Constitution which abolished the measures in the Rumford Act protecting Negroes from housing discrimination. The Supreme Court declared the amendment unconstitutional on grounds which have been widely criticized (see, e.g., 'Comment on *Reitman v. Mulkey*: A Recent Development in State Action Theory', *U.C.L.A. Law Review*, 14-1 (1966-7), p. 1). Nevertheless it is suggested that the decision can be supported on the ground that Proposition 13, by removing special measures designed to provide real and genuine equality for Negroes, itself denied the equal protection of the laws required by the Fourteenth Amendment.

<sup>3</sup> See S. M. Huang-Thio, 'Constitutional Discrimination under the Malaysian Constitution', *Malaya Law Review*, 6 (1964), pp. 1, 4; cf. S. S. Nigam, *Journal of the Indian Law Institute*, 2 (1959-60), p. 297.

<sup>4</sup> Above, p. 183.

<sup>5</sup> *Hansard*, H.C., vol. 768, no. 151, col. 231.



colour etc.'. This clause was ridiculed by several members during the debates, including Mr. Quintin Hogg<sup>1</sup> who remarked that it is not a good definition of an archdeacon to say he is one who performs archidiaconal functions.<sup>2</sup> Consequently, the Act provides that, for the purposes of the Act,

... a person discriminates against another if on the grounds of colour, race or ethnic or national origins he treats that other, in any situation to which section 2, 3, 4, or 5 below applies, *less favourably*<sup>3</sup> than he treats or would treat other persons, and in this Act references to discrimination are references to discrimination on any of those grounds.

This definition was included because many members believed that 'discriminate' had an appreciative as well as a pejorative meaning, and was something to be praised, not condemned. Others considered that a definition was unnecessary since the context 'discriminate' clearly meant the making of invidious distinctions against particular persons.<sup>4</sup> The latter view was clearly preferable in view of the definition now accepted in the international sphere, but it did not prevail. Alternatively, it would have been better to incorporate the essence of the international definition into the act, but the end result was the choice of the least desirable of the three possibilities open to the legislature.

The present definition clause may be more unsatisfactory than the lack of one,<sup>5</sup> since in the latter situation the judges might have been expected to make use of the definition contained in the 1965 Racial Discrimination Convention to which the United Kingdom is now a party.<sup>6</sup> No satisfactory reason has been proffered to explain why a definition similar to that contained in the recent international conventions on discrimination was not employed. Suggestions were made that a definition adapted from that found in Article 1 of the Convention on the Elimination of all Forms of Racial Discrimination should be used, but to no avail.<sup>7</sup> The Home Secretary even claimed that the definition proposed for s. 1 (1) of the Act was based on an early definition of discrimination proposed for this convention,

<sup>1</sup> Now Lord Hailsham, the Lord Chancellor.

<sup>2</sup> *Hansard*, H.C. Standing Committee B, 7 and 9 May 1968, cols. 7-91.

<sup>3</sup> Italics added.

<sup>4</sup> See *inter alia*, *Hansard*, H.C., vol. 768, no. 151, col. 234 (Mr. Weitzmann).

<sup>5</sup> See R. A. Hepple, 'Race Relations Act, 1968', *Modern Law Review*, 32 (1969), p. 181, and 'The British Race Relations Acts, 1965 and 1968', *University of Toronto Law Journal*, 19 (1969), p. 248.

<sup>6</sup> It is also suggested that the 'international' definition is now part of customary international law since it was widely accepted and reiterated in various United Nations resolutions and commentaries before being included in conventions. It is a commonplace that municipal courts should apply customary law in the absence of statutes and authoritative decisions to the contrary. (See, e.g., *Chung Chi Cheung v. The King*, [1939] A.C. 160, and below, p. 190 n. 7.)

<sup>7</sup> See, e.g., *Hansard*, H.C., vol. 768, no. 151, cols. 223 and 226 (Mr. Hunt), and also the comments of the Archbishop of Canterbury in *Hansard*, H.L., vol. 295, no. 115, col. 59, with whom Lords Idlesleigh and Walston agreed (col. 60). The Archbishop said that it would be difficult to improve upon the words in the 1965 Convention. Lord Byers took a similar view; *ibid.*, no. 123, col. 1286.

but he did not quote his sources.<sup>1</sup> On the other hand, it is correct, as Lord Stonham pointed out, that the *grounds* of discrimination in the clause in the Bill were taken from an early draft of the clause in the convention.<sup>2</sup>

The principal difficulty with the definition as it appears in the Act is that s. 1 (1) can be interpreted to mean that 'affirmative action'<sup>3</sup> in favour of immigrant and minority groups is contrary to the provisions of the Act, since it will inevitably mean treating some sections of the population 'less favourably' than the particular groups being assisted and give rise to claims that other sections of the population are thereby being discriminated against. Such affirmative action might include 'crash programmes' to improve educational standards and professional skills, as well as special language classes for immigrants. Such measures have been suggested in several recent studies, in particular, the *Plowden Report on Children and their Primary Schools*,<sup>4</sup> and the *Hunt Report on Immigrants and the Youth Service*.<sup>5</sup>

Should the Act be interpreted as prohibiting such special protective measures it would be gravely defective. Nevertheless, it is submitted that the courts would be entitled to incorporate into the definition of discrimination the meaning now accepted in international instruments and by United Nations organs.<sup>6</sup> It is established doctrine that there is a presumption that a statute should not be held to conflict with a State's obligations under international law unless that statute is clear and unambiguous.<sup>7</sup> It is unfortunate, however, that no special reservation was made in the case of actual protective measures,<sup>8</sup> particularly since an amendment to make it

<sup>1</sup> *Hansard*, H.C., vol. 768, no. 151, col. 241. The words 'less favourably' appear in no early draft of the 1965 Convention.

<sup>2</sup> *Hansard*, H.L., vol. 295, no. 123, col. 1290.

<sup>3</sup> This is often referred to as 'positive discrimination'. See the *Plowden Report* (H.M.S.O., 1967), paras. 148-53, and D. G. T. Williams, 'Legal Aspects of Positive Discrimination', in *Social and Economic Administration*, 2 (1968), no. 4, p. 242. This is an unfortunate usage whether we accept the definition in the Act or the Convention since discrimination in both instruments is defined as something undesirable. To avoid confusion the terms 'affirmative action' or 'positive measures' are preferable.

<sup>4</sup> (H.M.S.O., 1967), paras. 148-53. See also the *Newsom Report* (H.M.S.O., 1963), 'Half Our Future', chapter 3, and the *Gittins Report on Primary Education in Wales*.

<sup>5</sup> (H.M.S.O., 1967), paras. 51-2 and 58. The *Hunt Report* recognizes that 'special provisions' of a temporary nature, might be required to meet the needs of some young immigrants.

<sup>6</sup> i.e. that discrimination shall not be deemed to include special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups in order to ensure such groups or individuals equal enjoyment of human rights and fundamental freedoms, so long as they do not entail the maintenance of separate rights for different racial groups and are not continued after the objectives for which they were taken have been achieved.

<sup>7</sup> See *The Le Louis* (1817), 2 Dods. 210, 251, 254; *Polites v. The Commonwealth* (1945), 70 C.L.R. 60 (High Court of Australia); *Colloco Dealings Ltd. v. Inland Revenue Commissioners*, [1962] A.C. 1, 19, and [1961] 1 All E.R. 162, 165. Cf. also *Theophile v. Solicitor-General*, [1950] A.C. 186, 195.

<sup>8</sup> A vaguely worded exemption which would have permitted anything done 'in good faith for the benefit of a particular section of the public and which has the effect of promoting the integration of members of that section of the public into the community' was deleted at the Committee

quite clear that the Act did not permit a 'separate but equal' doctrine was accepted. Article 1 (2) provides:

It is hereby declared that for these purposes<sup>1</sup> segregating a person from other persons on any of those grounds<sup>2</sup> is treating him less favourably than they are treated.<sup>3</sup>

The absence of a provision permitting special measures led to other difficulties in the Act. Article 8 (2) is the notorious 'racial balance' clause which provides that 'it shall not be unlawful to discriminate against<sup>4</sup> any person with respect to the engagement for employment in, or the selection for work within, an undertaking or part of an undertaking, if the act is done in good faith for the purpose of securing or preserving a reasonable balance of persons of different racial groups employed in the undertaking . . .'. This clause was widely criticised in both Houses of Parliament for enshrining and licensing racial discrimination.<sup>5</sup> The provision has built-in difficulties of interpretation<sup>6</sup> and turns the American idea of racial balance on its head since in the United States racial quotas in employment have been used as goals not as limits.<sup>7</sup> If discrimination had been defined as in the 1965 Racial Discrimination Convention and if the notion of special concrete measures of assistance had been accepted rather than a 'racial balance' it would be difficult to raise objections. Certain job reservations<sup>8</sup> could have been made in favour of first generation immigrants<sup>9</sup> on the ground that they required special assistance in order to attain a real and genuine level of social equality. Affirmative measures designed to alleviate the natural disadvantages of immigrants can be linked to the special benefits granted to the elderly, mothers, widows and invalids.<sup>10</sup> These benefits are designed to

stage on the grounds that it might encourage separate treatment: *Hansard*, H.C. Standing Committee B, 1968, cols. 240-62, and H.C. Debates, vol. 768, cols. 267-73.

<sup>1</sup> i.e. the purposes of the Act (see s. 1 (1)).

<sup>2</sup> i.e. colour, race, ethnic or national origins.

<sup>3</sup> The desirability of such a clause was widely canvassed in the Commons (*Hansard*, H.C., vol. 768, cols. 223-43), and the final text is based on an amendment proposed by Baroness Gaitskell in the Lords (ibid., H.L., vol. 295, cols. 1285-95; H.C., vol. 770, cols. 1334-5).

<sup>4</sup> i.e. treat 'less favourably'.

<sup>5</sup> It was suggested that the clause 'kicked the Bill in the teeth' see, for example, *Hansard*, H.C., Standing Committee B, 1968, cols. 520, 546, 551, 554 and H.C. Debates, vol. 768, cols. 385-97; H.L., vol. 295, no. 115, cols. 59-64.

<sup>6</sup> See D. G. T. Williams, op. cit. (above, p. 190 n. 3).

<sup>7</sup> R. A. Hepple, 'Race Relations Act, 1968', *Modern Law Review*, 32 (1969), p. 181. The American Model Anti-Discrimination Act gave the administering agency power to sanction schemes designed to eliminate 'racial imbalance'. Although the *Street Report on Anti-Discrimination Legislation* (pp. 76, 81) favoured such a provision in the United Kingdom, its advice was not accepted.

<sup>8</sup> It has already been noted that reservations and quotas can in some circumstances be acceptable; above, p. 187, n. 7.

<sup>9</sup> Who are any way the only persons to whom s. 8 (2) applies; see s. 8 (4).

<sup>10</sup> See J. Jowell, *Public Law*, 119 (1965), p. 181; Williams, loc. cit. (above, p. 190 n. 3); Dorsen, loc. cit. (above, p. 188 n. 1), p. 312; and Pinker in *Social and Economic Administration*, 2 (1968), no. 4, p. 227.



achieve genuine *de facto* social equality and should not be regarded as discriminatory.

Other provisions of the Act appear to be incompatible with the 1965 Convention,<sup>1</sup> but despite its manifest imperfections it does provide some useful measures of protection against racial discrimination and is to be welcomed for that reason. It is nevertheless to be deprecated that when the Act was being drafted more attention was not paid to the immense corpus of material available from external sources. Endeavours should be made to ensure that, in future municipal instruments dealing with discrimination and many other matters, the experience of international organs will be utilized more fully.

<sup>1</sup> i.e. the Act permits discrimination on ships with regard to the provision of sleeping accommodation for passengers (section 7 (6)) and common facilities for seamen (section 8 (10)). And see I. Macdonald, *Race Relations and Immigration Law* (1969), p. 13.

## NOTES

### ANNUAL REPORTS OF THE INTERNATIONAL COURT OF JUSTICE TO THE GENERAL ASSEMBLY?\*

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In 1968 departing from its own regular practice of more than two decades as well as from the constant practice of its predecessor, the Permanent Court of International Justice, the International Court of Justice began submitting annual *Reports* to the General Assembly of the United Nations.<sup>1</sup> It continues to publish, simultaneously, its *Yearbooks* which cover exactly the same period as the new *Reports* but are incomparably more comprehensive. They are, however, issued by the Registrar of the Court while the *Reports* are signed by its President. Since a basic principle is at stake (the independence of the judiciary), some comments on the legal and political implications of the new practice may be in order.

In *Series E* of its publications the Permanent Court of International Justice issued *Annual Reports* covering its activities from 15 June to 15 June of each year.<sup>2</sup> They were not, however, submitted to the Assembly of the League of Nations for 'consideration' by this organ. Neither the League Covenant nor the Court's Statute made provision for such reports.

#### 1. *The obligation of U.N. organs to report to the General Assembly*

By contrast, Article 15 of the Charter specifies that the 'General Assembly shall receive and consider annual and special reports from the Security Council' (para. 1) and that it 'shall also receive and consider reports from the other organs of the United Nations' (para. 2). Since the International Court of Justice is one of the 'principal organs' of the United Nations (Article 7 (1) of the Charter) and 'the principal judicial organ of the United Nations' (Article 92 of the Charter), it would seem to be covered by Article 15 (2) of the Charter. Rule 13 of the General Assembly's Rules of Procedure provides indeed that the 'provisional agenda of a regular session shall include: (a) Report of the Secretary-General on the work of the Organization; (b) Reports from the Security Council, the Economic and Social Council, the Trusteeship Council, *the International Court of Justice*,<sup>3</sup> the subsidiary organs of the General Assembly, [and

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<sup>1</sup> See 'Report of the International Court of Justice, 1 August 1967-31 July 1968', *General Assembly, Official Records (G.A.O.R.)*, 23rd Session, Suppl. no. 17 (A/7217); 'Report... 1 August 1968-31 July 1969', *ibid.*, 24th Session, Suppl. No. 5 (A/7605).

<sup>2</sup> Except for the First and Sixteenth (last) Reports which covered the periods of 1 January 1922 to 15 June 1925 and of 15 June 1939 to 31 December 1945 respectively. See *P.C.I.J.*, Series E, Nos. 1 and 16.

<sup>3</sup> Italics added.

the] specialized agencies (where such reports are called for under agreements entered into); . . .'. Rule 13 is one, but not the only possible, interpretation of Article 15 of the Charter and constitutes another case of a so-called interpretative subsequent practice of an organ under its constituent instrument.<sup>1</sup> Obviously, the General Assembly cannot 'receive and consider' reports unless they are submitted to it. Article 15 thus implies the submission of such reports but does not expressly stipulate an obligation for the Security Council and 'the other organs of the United Nations' to make and submit them. The duty of the Security Council to report to the General Assembly follows, however, from another provision of the Charter: according to Article 24 (3) the 'Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration', which reports 'shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security' (Article 15 (1) *in fine*).

The only other principal organ which the Charter specifically requires to report to the General Assembly is the Secretary-General: under Article 12 (2) the 'Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly . . . immediately the Security Council ceases to deal with such matters'. Under Article 98 *in fine* the 'Secretary-General shall make an annual report to the General Assembly on the work of the Organization'. No obligation to report is expressly stipulated in the Charter or the Statute for the other principal organs: the Economic and Social Council, the Trusteeship Council and the Court. Under Article 64 (2) of the Charter the Economic and Social Council '*may*<sup>2</sup> communicate its observations on these reports [by the specialized agencies] to the General Assembly'; but anybody may do so, although without being assured of their consideration by the Assembly. Nor does the Charter contain express provisions for mandatory reports by the subsidiary organs or the specialized agencies. Rule 13 of the General Assembly's Rules of Procedure (1) makes no distinction between reports by principal organs which are expressly required to submit annual reports and those which are not, and (2) adds subsidiary organs and specialized agencies which are not expressly mentioned in Article 15. This does not mean, however, that the General Assembly considers subsidiary organs and specialized agencies as 'other organs of the United Nations' in the sense of Article 15 (2). This would indeed be a very broad interpretation of this provision, in particular as far as the autonomous specialized agencies are concerned. The inclusion of reports by these agencies is rather due to the fact that they are 'called for under agreements entered into', as the above-quoted parenthesis of Rule 13 (b) *in fine* indicates. In fact, under Article 64 (1) of the Charter 'the Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies' and 'may make arrangements . . . with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly'. The agreements with the various specialized agencies entered into by the Economic and Social Council under the terms of Articles 63 and 64 of the Charter

<sup>1</sup> For further examples and the question in general, see Engel, '“Living” International Constitutions and the World Court (The subsequent practice of international organs under their constituent instruments)', *International and Comparative Law Quarterly*, 16 (1967), pp. 867-910; and by the same author 'Procedures for the *de facto* Revision of the United Nations Charter', *Proceedings of the American Society of International Law* (1965), pp. 108-16.

<sup>2</sup> Italics added.



provide indeed for the submission of annual reports to the United Nations on the activities of the agencies.<sup>1</sup>

Similarly, the inclusion of the reports by the subsidiary organs of the General Assembly in the provisional agenda of its regular sessions may be due not to their character as 'other organs' within the meaning of Article 15 (2) but to provisions to this effect in their terms of reference.<sup>2</sup> The same applies to the Trusteeship Council which, according to Rule 100 of its Rules of Procedure, 'shall present annually to the General Assembly a general report on its activities and on the discharge of its responsibilities under the International Trusteeship System'. By contrast, the Rules of Procedure of the Economic and Social Council contain no provision requiring the Council to submit annual reports to the General Assembly although the Council does so regularly.

Since the Economic and Social Council and, with regard to non-strategic areas, the Trusteeship Council are under the authority of the General Assembly (Articles 60, 66 (3), and 85 of the Charter), as are also the Assembly's subsidiary organs, Rule 13 of the Assembly's Rules of Procedure (and Article 15 (2) of the Charter) may be interpreted as instructions by the Assembly to these organs to submit annual reports. As for the strategic trust areas, the above-mentioned Rules 100 et seq. of the Trusteeship Council's Rules of Procedure apply; they do not distinguish between strategic and non-strategic areas which are under the ultimate responsibility of the Security Council and the General Assembly, respectively (Articles 83 and 85 of the Charter). The fact that the two Councils and the subsidiary organs of the General Assembly are under the latter's authority while the specialized agencies which are autonomous are not under its authority may explain why Rule 13 contains the parenthesis concerning reports being 'called for' in connection with the specialized agencies, but not with the subsidiary organs or the two Councils.

None of this, it is submitted, applies to the International Court of Justice which is not under the authority of any organ of the United Nations. It is 'the principal judicial organ of the United Nations' (Article 92 of the Charter) which 'shall be constituted and shall function in accordance with the provisions of the present Statute' (Article 1). It 'shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character . . . [qualified for] the highest judicial offices, or . . . jurisconsults of recognized competence in international law' (Article 2 of the Statute). According to Article 16 (1) of the Statute 'no member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature'. Nor can he be 'dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions' (Article 18 (1) of the Statute). The Court's 'function is to decide in accordance with international law such disputes as are submitted to it' (Article 38 (1) of the Statute) and even 'in the exercise of its advisory functions the Court shall further be guided by the provisions of the . . . Statute which apply in contentious cases to the extent to which it recognizes them to be applicable' (Article 68 of the Statute). In short, the Court is an independent judicial and not a dependent political body—

<sup>1</sup> See, e.g., Article 5 (2b) of the Agreement between the United Nations and the International Telecommunications Union.

<sup>2</sup> See, e.g., para. 5 of the General Assembly Resolution 332 (IV) of 2 December 1949 concerning the Special Committee on Information Transmitted under Article 73e of the Charter. It will be noted that Rule 13 (b) does not mention the subsidiary organs of the principal United Nations organs other than the General Assembly—presumably because their activities would be covered by the reports of the other principal organs concerned.

despite the role which the other principal United Nations organs, in particular the General Assembly and the Security Council, play with regard to it.

2. *The role of the General Assembly and the Security Council with regard to the Court*

(a) *Both organs.* The members of the Court are elected by both organs (Article 4 (1) of the Statute); upon recommendation of the Security Council, the General Assembly lays down the conditions under which parties to the Statute but not Members of the United Nations may participate in electing the Court (Article 4 (3) of the Statute); like the Security Council, the General Assembly may request the formation of a joint conference committee consisting of six members, each organ appointing three, to fill vacant seats (Articles 12 (1) and 14 of the Statute); similarly, both organs may request the Court to give an advisory opinion on any legal question (Article 96 (1) of the Charter). If the possession of these powers by the political organs were a reason for requiring the Court to submit reports, it would have to submit them to both organs.

(b) *The General Assembly alone.* In addition, each of the two organs has certain exclusive powers respecting the Court: only the General Assembly may authorize 'other organs of the United Nations and specialized agencies . . . [to] request advisory opinions of the Court on legal questions arising within the scope of their activities' (Article 96 (2) of the Charter). Similarly, under Article 32 of the Statute it is only the General Assembly which has the power to fix the 'salaries, allowances and compensation' of the members of the Court (para. 5) and, on the proposal of the latter, the salary of the Registrar (para. 7). Finally, only the General Assembly decides in what manner the expenses of the Court shall be borne by the United Nations (Article 33 of the Statute). According to the draft amendment to Article 22 (1) of the Statute proposed by the Court in 1969, 'the seat of the Court shall be established at The Hague or at such other place as shall at any time be approved by the General Assembly on the recommendation of the Court'.<sup>1</sup>

(c) *The Security Council alone.* When a 'party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court' it is only the Security Council to which 'the other party may have recourse' and which may then, 'if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment' (Article 94 (2) of the Charter). Similarly, only the Security Council lays down the 'conditions under which the Court shall be open to other states [not parties to the Statute] . . . subject to the special provisions contained in treaties in force' (Article 35 (2) of the Statute).

3. *No obligation of the Court to make reports*

It is submitted that none of the powers of the General Assembly mentioned above implies an obligation for the Court to submit annual reports to that organ—just as the powers of the Security Council equally do not imply any such obligation. The Security Council differs, however, from the General Assembly in this connection in two respects. First, the Charter does not provide with regard to it, as it does for the General Assembly, that it 'shall receive and consider reports from the other organs of the United Nations'. Secondly, the Charter does not authorize the Security Council, as it does the General Assembly, 'to discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organ provided for in the present Charter' (cf. Articles 15 (2) and 10 for the General Assembly). As pointed out above, Article

<sup>1</sup> Italics indicate the draft amendment. See *Report for 1968-9* (above, p. 193 n. 1), p. 3, and *I.C.J. Yearbook* (1968-9), p. 108.



15 (2) may imply that the Court as one of the 'other organs of the United Nations' shall submit reports to the General Assembly. As for Article 10, since the General Assembly may discuss any matters within the scope of the Charter (which includes the Statute) or relating to the powers and functions of any organs provided therein (which includes the Court), the implication may again be that in order to be able to act under Article 10 the General Assembly needs reports by the Court. Under Article 15 (2) the General Assembly '*considers*' the reports, which means it discusses them, takes position and possibly makes recommendations concerning them, taking note of them or adopting them with or without abstentions or objections.<sup>1</sup> At its twenty-third and twenty-fourth sessions, the General Assembly took note of the two *Reports* of the Court on 21 December 1968 and 12 December 1969, respectively, without having referred them to any of its main committees.<sup>2</sup> The *Report* for 1967-8 deals in less than five pages with the composition, jurisdiction, judicial activity (two contentious cases) an administrative session (visit by the Secretary-General, revision of the Rules, internal judicial practice, incompatibility of functions, relations with other international organs and bodies<sup>3</sup>), publications and programme of work of the Court.<sup>4</sup> The *Report* for 1968-9 has the same size and contents.<sup>5</sup> In 'considering' the *Reports* what else might the General Assembly have done but take note of them? Using the above-mentioned subjects covered in the two *Reports* as examples: should or could the Assembly have stated that it disliked the composition of the Court in general or certain of its members in particular, that it was not satisfied with the jurisdiction of the Court, that the Court's judicial activity displeased it, that it preferred other Rules of Procedure or a different internal judicial practice, that it considered certain functions of the judges as incompatible with judicial office, that the Court should or should not have 'relations' with other bodies or that it considered some of them illegitimate, that it objected to some of its publications or that the next session should not open at the contemplated date?

Under the second above-mentioned provision of the Charter distinguishing the General Assembly from the Security Council (Article 10), the General Assembly may discuss the questions and matters specified therein and, 'except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions and matters'. The same questions as those raised above in connection with Article 15 (2) could be raised under Article 10. And the answer to them seems to be equally clear, i.e. negative. If the activities of the Court come under Article 10, as a literal interpretation of this provision would allow one to claim, the remarkable conclusion would be reached that the General Assembly could not only freely discuss the Court and its activities but also make with regard to them any recommendations it pleased to the Security Council, to Members or to both. Under this interpretation the General Assembly could state that it disagreed with a judgment or advisory opinion of the Court, that the Court was wrong, and that it decided otherwise. The only express limitation of this power of recommendation

<sup>1</sup> See *Repertory of Practice of United Nations Organs*, vol. 1, pp. 488 et seq., 497-8.

<sup>2</sup> See Resolutions Adopted by the General Assembly during its 23rd Session, *G.A.O.R.*, Suppl. No. 18 (A/7218), p. 8; and G.A. doc. A/PV 1830, pp. 20-1.

<sup>3</sup> In this connection one would have expected a word about the reasons for the innovation to report to the General Assembly. As for these reasons, see below, pp. 198 et seq.

<sup>4</sup> See above, p. 193 n. 1.

<sup>5</sup> *Ibid.*, except that it also deals with the above-mentioned proposal of the Court to amend Articles 22, 23 (2) and 28 of the Statute, with an Annex containing the Court's explanatory memorandum about which see the writer's forthcoming note on 'Amending the Statute: Articles 22, 23, 28 and/or 36 and 38?' to be published shortly.



would be that 'provided in Article 12': namely, no recommendation with regard to disputes or situations 'while the Security Council is exercising in respect of [them] . . . the functions assigned to it in the present Charter . . . unless the Security Council so requests'. It is submitted that such a conclusion, while possible *de lege lata*, is incompatible *de lege ferenda* with the role and character of the highest international judicial organ. Learned writers distinguish between the role of the Court as a United Nations organ and its role as an organ of international law<sup>1</sup> and emphasize the position of the Court within the framework of the United Nations.<sup>2</sup> However, even if allowance is made for such points, the fact still remains that whatever differences in rank and dependence exist between the six principal organs, they are established by the Charter<sup>3</sup> and, as the above survey of the relevant Articles of the Charter has shown, no provisions have been found which establish the authority of the General Assembly over the Court, with the exception of the possible implications of Articles 10 and 15 (2).

In actual practice no attempt seems to have been made by the General Assembly up to 1959<sup>4</sup> to assert its superiority over the Court under these two Articles. With regard to Article 15 in particular it has been stated in the *Repertory of Practice of United Nations Organs* that, despite Rule 13 of the General Assembly's Rules of Procedure which expressly mentions reports by the Court, 'no such reports have . . . been submitted by the Court nor has the question been raised in the Assembly'.<sup>5</sup> Member States and the General Assembly may have been satisfied with the Secretary-General's Annual Report on the Work of the Organization which contains a section on the Court in the part dealing with legal questions, or with the very detailed *Yearbooks* of the Court.

#### 4. *Reasons for the new practice*

In the light of the above considerations it is easier to understand why neither the Permanent Court nor the present Court have submitted reports until 1968 than why the latter felt that it should depart from the previous practice. No reasons for the change have been given in the reports themselves or in the Court's *Yearbooks*. However, the President of the Court informed the Secretary-General of the United Nations in 1968 that

the Court, conscious of the need for closer cooperation with the other organs of the United Nations, has drawn up a report on its activities from 1 August 1967 to 31 July 1968 and wishes to submit this report to the General Assembly at its next regular session. The International Court of Justice feels that such a report, the first of its kind, would contribute to a better understanding of its functions and of its activities within the framework of the United Nations.<sup>6</sup>

<sup>1</sup> Leo Gross, 'The International Court of Justice and the United Nations', *Recueil des cours*, 120 (1967), pp. 320 et seq.

<sup>2</sup> Shabtai Rosenne, *The Law and Practice of the International Court* (1965), vol. 1, and his earlier *The International Court of Justice* (1957), *passim*, and my comments thereon in the *American Political Science Review*, 60 (1966), p. 1015, and in the *Journal of Politics*, 23 (1961), pp. 164-5.

<sup>3</sup> Although the six organs are listed in Article 7 without hierarchical qualifications, this does not mean that they are equal in status, as the positions of the Economic and Social Council, the Trusteeship Council and the Secretariat demonstrate.

<sup>4</sup> This is the period covered by the *Repertory of Practice of United Nations Organs* and its *Supplements* which have been published so far; see vol. 1, pp. 257 et seq., 483 et seq.; Suppl. No. 1, vol. 1, pp. 115 et seq., 175 et seq.; Suppl. No. 2, vol. 2, pp. 11 et seq., 153 et seq.

<sup>5</sup> *Repertory of Practice of United Nations Organs*, vol. 1 (1955), p. 485.

<sup>6</sup> See the Explanatory Memorandum by the Secretary-General attached to his request for the inclusion in the agenda of the 23rd regular session of the General Assembly of a supplementary item, doc. A/7181, *G.A.O.R.*, 23rd Session, Annexes, Agenda item 14, p. 1.

This communication was received after the publication of the provisional agenda of the General Assembly's twenty-third session. The Secretary-General therefore proposed the inclusion in the agenda of a supplementary item entitled 'Report of the International Court of Justice'.<sup>1</sup>

Consciousness of the need for closer co-operation with the other United Nations organs and the feeling that such reports would contribute to a better understanding of the Court's functions and activities within the framework of the United Nations are thus the reasons which prompted the Court to change its practice and to submit hurriedly a report to the General Assembly at its forthcoming session. However, it is difficult to see how such short reports, as indicated above, could better contribute to an understanding of the Court's functions and activities than its extensive and comprehensive *Yearbooks* which, together with its other publications, are distributed to all the States entitled to appear before it. Nor is it easy to understand how the submission of such reports to the General Assembly could *per se* meet the need for closer co-operation not only with the Assembly but also 'with the other organs of the United Nations'. The extent of the Court's 'co-operation' with such organs is determined by the Charter, the Statute and other international instruments in force.

It seems that the new practice is part of a new public relations programme initiated by the Court after the criticism caused by its judgment in the *South-West Africa* cases which were decided against the claimants by the President's casting vote.<sup>2</sup> On 28 April 1967 the Court appointed a Committee on Relations (composed of Judges Sir Gerald Fitzmaurice, Sir Muhammad Zafrulla Khan, Ammoun and Lachs) which, in May 1968, was transformed into a standing committee.<sup>3</sup> The Court did this because it considered that

as the principal judicial organ of the United Nations (Charter, Art. 92), it can and should make an important and continuing contribution to the accomplishment of the purposes and principles of the Charter. To attain this objective it proposes to make its true role and its work better known and understood. It is also conscious of the usefulness of following more closely developments within international organizations and institutions and their work.<sup>4</sup>

At the same time the Court decided to 'review all publications and documents issued' by it 'so as to ensure that their scope and distribution meet present needs as fully as possible'.<sup>5</sup> Apparently the new *Reports* are designed to meet such needs.

Still in the field of 'relations', on 7 and 9 April 1968 Mr. U. Thant 'paid an official visit to the Court . . . the first by the present Secretary-General, who had been unable to accept an invitation extended to him the previous year'. It followed 'conversations which the President and other Members of the Court had had in New York in connection with the opening of the United Nations General Assembly session in September 1967'.<sup>6</sup> Since then a delegation of the Court, led by its President, is present during the regular sessions of the General Assembly.<sup>7</sup> On the occasion of the fiftieth anniversary of the International Labour Organization in 1969 the President of the Court addressed the International Labour Conference in Geneva. He was also received by the International Law Commission holding its 21st session in Geneva.

<sup>1</sup> Ibid.

<sup>2</sup> *I.C.J. Reports*, 1966, pp. 6 et seq.

<sup>3</sup> *I.C.J. Yearbook* (1967-8), p. 93; *I.C.J. Report*, 1967-8, no. 44.

<sup>4</sup> Ibid., no. 43.

<sup>5</sup> Ibid., no. 46.

<sup>6</sup> *I.C.J. Yearbook* (1967-8), p. 92.

<sup>7</sup> Ibid. (1968-9), p. 113. When the delegation attends the meetings of the Assembly's Sixth Committee (Legal Questions), it is usually seated in the back of the hall while the President of the International Law Commission sits on the dais next to the President of the Committee.

Whether these public relations operations should be 'relaxed', may be a question of taste. In view of the sharp decrease of cases brought before the Court (at the time of the submission of the first *Report* two cases were on the docket while at the present there is one), the desire of the Court to change its 'image' in the wake of the judgment in the *South-West Africa* cases is understandable. However, the prestige and reputation of the Court and the confidence which it inspires depend upon its composition—about which it can do nothing—and upon its judicial activities (judgments and advisory opinions)—about which it and only it can do anything. Criticism of the Court is not prevented by public relations operations in general or by the submission of short reports to the General Assembly in particular. On the contrary, such reports may provoke politically inspired debates and it would seem to be better not to lead the General Assembly into temptation. Contrary to what it did in 1968 and in 1969, the General Assembly may decide to refer the *Report* of the Court to one of its main committees where it is at least as likely that it will cause criticism and political discussion—the 1967 experience is not a good omen<sup>1</sup>—than that it will lead to constructive ideas about promoting the Court's business. It would therefore seem to be more advisable to be more cautious. *Principiis obsta!*

<sup>1</sup> See Gross, loc. cit. (above, p. 198 n. 1), pp. 324 et seq., with further references.



# INDIA AS AN ANOMALOUS INTERNATIONAL PERSON (1919–1947)\*

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## *International personality—some theoretical observations*

International personality is a juridical concept which is regarded as essential to provide a legal basis for entitling a subject to rights and obligations under international law.<sup>1</sup> It appears, however, to be an intractable topic<sup>2</sup> because how it is generally determined under international law is not clear. According to Lissitzyn 'it may, indeed, be doubted that international law contains any objective criteria of international personality'.<sup>3</sup> In his view '... the very act or practice of entering into international agreements is sometimes the only test that can be applied to determine whether an entity has such a personality ...'.<sup>4</sup> On the other hand, Schwarzenberger suggests that 'an intermediate state on the road from dependence to independence may also lead to a stage of limited international personality'.<sup>5</sup> Lord McNair categorically asserts that the 'criterion is really international recognition'.<sup>6</sup> States which are independent<sup>7</sup> members of the international community, indeed possess international personality, but they are not the only international persons. 'It has always been a principle of international law' observed the International Law Commission in its commentary to the Draft Articles on the Law of Treaties in 1959, 'that entities other than States might possess international personality'.<sup>8</sup> Examples of such entities are not so numerous, but they include non-State entities like the United Nations,<sup>9</sup> some dependencies and colonies,<sup>10</sup> which are on their way to statehood, and also 'communities which have been customarily described as States and which as a matter of internal and constitutional law can be

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<sup>1</sup> Schwarzenberger has defined international personality as follows: 'International personality means capacity to be a bearer of rights and duties under international law', *A Manual of International Law* (5th edn., 1967), vol. 1, p. 53.

<sup>2</sup> U.N. Doc. A/CONF. 39/11, 1969. *United Nations Conference on the Law of Treaties*, First Session, 20 March–24 May 1968, *Official Records*, p. 60.

<sup>3</sup> 'Efforts to codify or Restate the Law of Treaties', *Columbia Law Review* 62, (1962), pp. 1183–4. See, however, M. Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', this *Year Book*, article on pp. 111 et seq., above.

<sup>4</sup> Lissitzyn, loc. cit. in the preceding note.

<sup>5</sup> Op. cit. (in n. 1 on this page), p. 61.

<sup>6</sup> *The Law of Treaties: British Practice and Opinions* (1938), pp. 67, 75–6; R. Y. Jennings, 'General Course on Principles of International Law', *Recueil des cours* (1967–II), p. 349.

<sup>7</sup> *Yearbook of the International Law Commission* (1953–II), p. 94; *The Lotus case*, see Briggs, *The Law of Nations* (2nd edn., 1953), p. 6; Hall, *International Law* (8th edn., 1924), p. 17.

<sup>8</sup> *Yearbook of the International Law Commission* (1962–II), p. 37; R. Y. Jennings, loc. cit. (above, n. 6 on this page), pp. 346–7.

<sup>9</sup> *Reparation for Injuries Suffered in the Service of the United Nations case*, *I.C.J. Reports*, 1949, p. 185; also see Whiteman, *Digest of International Law* (1963), vol. 1, p. 584. R. Y. Jennings, op. cit., p. 347.

<sup>10</sup> *Yearbook of the International Law Commission* (1965–II), p. 17. Also see Schwarzenberger, op. cit. (above, n. 1 on this page), pp. 60–1.

considered States by virtue of their political cohesion, their internal autonomy and their historical status'.<sup>1</sup> Protectorates,<sup>2</sup> protected and vassal States,<sup>3</sup> the Holy See and the constituent units<sup>4</sup> of some federal States belong to the latter group.

International persons are not 'necessarily identical in their nature . . .'.<sup>5</sup> Thus international law has to deal not only with normal but also with anomalous international persons whose existence is more a matter of historical accident and of the changing requirements of international life than of design. 'International personality may be accorded provisionally or definitely, conditionally or unconditionally, completely or incompletely, and expressly or by implications. The scope of the international personality granted is a matter of intent.'<sup>6</sup>

It has been pointed out in the *Reparation for Injuries* case that the rights of international persons vary because all international persons are not alike.<sup>5</sup> Thus, for instance, a fully sovereign State which is a normal subject of international law has the right to conclude treaties, the right of legation, the right to membership of international organizations, the right to declare war and conclude peace, etc. But non-State entities and anomalous international persons do not *ipso jure* possess all these rights. In so far as protectorates and protected States are concerned, the extent of their international participation has specifically been defined by the treaty establishing the protectorate. Normally when States lose their international personality they are designated as vassal States. The Indian Princely States under the Paramountcy of the British Crown provide the best example of vassal States. Yet Tibet, which was a vassal State of China, exercised the treaty-making power with the acquiescence of the suzerain power, when she was admitted to the Tripartite Conference at Simla in 1914 and was treated as a party to the Simla Convention along with Great Britain and China. Therefore, in the case of protectorates, protected States and vassal States, the measure of international personality given is governed by the intent, the acquiescence of the external sovereign under whose international guardianship they have been placed, and also by the recognition accorded to them by third States. In regard to the constituent units of federal States, their capacity—a limited one—to enter into international relations depends on the provisions of the federal constitution.

As to the limited international personality of a dependent State, this may sometimes be conceded by the metropolitan State in accordance with its policy of 'planned development towards self-government or complete independence' of the territory.<sup>7</sup> In other words, the intention is to transform a State 'not fully *sui juris*' into a State

<sup>1</sup> *Yearbook of the International Law Commission* (1953-II), p. 95.

<sup>2</sup> On Morocco as a French protectorate see, *Right of Nationals of the United States in Morocco*, *I.C.J. Reports*, 1952, pp. 185, 188. For Sikkim as a protectorate, Art. 2 of the Indo-Sikkim Peace Treaty, 1950; Bhutan's legal status has not been clearly mentioned in the Indo-Bhutan Treaty, 1949, but India's international guardianship over Bhutan's foreign relations has been mentioned in it. See *Foreign Policy of India: Texts of Documents 1947-64* (1966), pp. 4-9, 169-74; also see Aitchison, *Treaties, Engagements and Sanads* (2nd edn., 1909), vol. 2, p. 331; V. H. Coelho, *Sikkim and Bhutan* (1970), p. 68.

<sup>3</sup> On Danzig as a protected State see *P.C.I.J.*, Series B, No. 15, p. 17. On Tibet as a vassal State of China at the time of the Simla Convention, 1914, see Aitchison, *Treaties, Engagements and Sanads* (5th edn., 1929), vol. 14, pp. 34-7; Whiteman, *op. cit.* (above, p. 201 n. 9), pp. 587-93.

<sup>4</sup> The Swiss cantons under the Swiss Constitution and Byelo-Russia and Ukraine under the Soviet Constitution.

<sup>5</sup> *Reparation for Injuries* case, Whiteman, *op. cit.* (above, p. 201 n. 9), p. 583.

<sup>6</sup> Schwarzenberger, *op. cit.* (above, p. 201 n. 1), p. 70.

<sup>7</sup> *Yearbook of the International Law Commission* (1959-II), p. 75 n. 128.

fully *sui juris* by gradually 'throwing off the status of dependency' in this process.<sup>1</sup> Therefore, in discussing the Draft Articles on the Law of Treaties some members of the International Law Commission were of the opinion that the Article on 'capacity to conclude treaties' should also include dependent States and such other entities mentioned earlier. The U.S. representative said: '... it would be paradoxical if at the present time areas approaching independence could not be encouraged by being entrusted with authority to conclude agreements in their own names.'<sup>2</sup> As regards the international personality of cantons and provinces of a federal State some authorities have expressed a contrary view. Thus, for instance, Brierly, the first Special Rapporteur on the Law of Treaties, stated in his 1950 *Report on the Draft Articles on the Law of Treaties*:

As it is used in this Convention, the term 'State' would clearly apply to all Members of the United Nations or of specialized agencies and all parties to the Statute of the International Court of Justice. It would also apply to the Vatican City State. *But it would not apply to such entities as cantons or provinces of a federal State completely lacking in international personality.*<sup>3</sup>

Similarly, Sir Gerald Fitzmaurice, the third Special Rapporteur on the Law of Treaties, in his 1956 *Report* referring to an Article in his draft containing definitions observed:

... this article is mainly concerned to define the term 'State' in order to make it clear by implication that semi-sovereign or protected States can be parties to the treaties (though in many cases only mediately) while at the same time bringing out the limitations on, and modalities of this position. Apart from international organizations, only States can be parties to the treaties; and only those entities are States that are capable *as such*, (and not merely as part of a larger entity) of being bound by a treaty. For this reason, a constituent State of a federation can never be a State *internationally* or, as such, party to a treaty—for the treaty will bind the federation and will bind the constituent State, not as such, but only as an (internationally) indistinguishable part of the federation. But an internationally self-contained State, even if it is a protected State, can be bound as such, even if only with the consent, general or specific, or through the medium of the protecting State.<sup>4</sup>

According to Fitzmaurice, the crux of the problem was the 'possession of treaty-making capacity'. This involved international personality in the sense that all entities having treaty-making capacity necessarily had international personality. On the other hand, it did not follow that all international persons had treaty-making capacity.<sup>5</sup>

The Commission's fourth and final Special Rapporteur, Sir Humphrey Waldock, proposed an article on capacity to become a party to treaties which would, *inter alia*, have included a provision recognizing the possibility of a dependent State's becoming a party to a treaty under certain conditions.<sup>6</sup> While some members thought such a provision desirable as helping in the process of emergence to independence, others considered it open to objection as appearing to endorse the existence of colonial regimes. The Commission's draft article on 'capacity to conclude treaties' was therefore limited to three specific cases: States, units of a federal State under certain

<sup>1</sup> U.N. Doc. A/CN. 4/115, *ibid.* (1958-II), p. 33.

<sup>2</sup> *Ibid.* (1965-II), p. 17.

<sup>3</sup> U.N. Doc. A/CN. 4/23, *Yearbook of the International Law Commission* (1950-II), p. 229 (*italics added*).

<sup>4</sup> U.N. Doc. A/CN. 4/101, *ibid.* (1956-II), p. 118. In regard to the treaty-making capacity of Swiss cantons, he expressed his disagreement with Sir Hirsch Lauterpacht's views.

<sup>5</sup> U.N. Doc. A/CN. 4/120 *Yearbook of the International Law Commission* (1959-II), p. 96.

<sup>6</sup> U.N. Doc. A/CN. 4/Ser. A/1962/Add. 1, *ibid.* (1962-II), p. 164.



conditions and international organizations. The case of 'organizations' was dropped when it was decided to restrict the scope of the draft convention to treaties concluded between States. Ultimately at the Vienna Conference, owing to the opposition of States having federal constitutions, the case of units of federal States was also omitted, and Article 6 of the Vienna Convention on the Law of Treaties regarding the 'capacity to conclude treaties' now reads: 'Every State possesses capacity to conclude treaties.'<sup>1</sup> It was also underlined in Article 1 that the Convention applied only to treaties between States.<sup>2</sup> Despite the omission of any reference to entities other than States in the Vienna Convention on Treaties, the position with respect to the international personality of non-State entities and States not fully *sui juris* still remains the same under general international law.

### *India's international personality (1919-1947)*

The foregoing analysis shows that normal international persons and anomalous international persons coexist in international law and they can be easily distinguished by reference to the nature and substance of the rights they enjoy and also to their functions. India's position between 1919 and 1947 was that of an anomalous international person.<sup>3</sup> She began to function as a separate entity in her external relations in 1919.<sup>4</sup> She was an original member of the League of Nations and a signatory to

<sup>1</sup> U.N. Doc. A/CONF. 39/27, 23 May 1969, p. 4.

<sup>2</sup> *Ibid.*, p. 2.

<sup>3</sup> Westlake's *Collected Papers* (1914), p. 218; Hall, *op. cit.* (above, p. 201 n. 7), p. 31; Oppenheim says: 'A State in its normal appearance does possess independence all round, and therefore full sovereignty. Yet there are States in existence, which certainly do not possess full sovereignty and are, therefore, named not-full sovereign States. All States which are under the suzerainty or under the protectorate of another State or member States of a so-called federal State, belong to this group. . . . That they cannot be full, perfect and normal subjects of international law there is no doubt. But it is wrong to maintain that they can have no international position whatever, and can never be members of the Family of Nations at all. They frequently send and receive diplomatic envoys, or at least consuls. They often conclude commercial or other international treaties. . . . Such imperfect international personality is of course an anomaly, but the very existence of States without full sovereignty is an anomaly itself.' *International Law*, vol. 1 (8th edn. 1955), p. 119. Then he explains the anomalous position of India in the following words: 'The position of India as subject of international law was for a time anomalous. She became a member of the League of Nations; she was invited to the San Francisco Conference of the United Nations. . . . She exercised the treaty-making power in her own right. However, so long as the control of her internal and external relations rested ultimately with the British Government and Parliament, she could not be regarded as a sovereign State and as a normal subject of international law. In 1947, she became a fully self-governing Dominion and an independent State'; *ibid.*, p. 209 n. 4.

Hyde characterized India's anomalous position as a 'distinctive entity' within the British Empire. *International Law* (2nd edn., 1951), p. 35. After referring to the treaty-making capacity of India he observes: 'Foreign States such as the United States when inviting India to become a party to Treaties, make known their desires through the medium of the Foreign Office of the United Kingdom. In these ways, the relationship of India to the outside world is seen to manifest itself and to raise the pertinent question whether that country has attained statehood in the international society'; *ibid.*

<sup>4</sup> This special position of India was first conceded by the Imperial War Conference in 1917. Resolution IX of the Conference stated: 'The Imperial War Conference are of opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the War, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities. . . . They deem it their duty, however, to place on record their view that any such readjustment, while thoroughly preserving all existing powers of self-government and complete control of

the Treaty of Versailles.<sup>1</sup> She separately ratified the Statute of the Permanent Court of International Justice.<sup>2</sup> She was an active member of the League of Nations. In accordance with a resolution of 15 December 1920 of the League Assembly, she was included as one of the members of the Advisory Committee on Traffic in Opium.<sup>3</sup> In 1921 she participated in the first General Conference on the Freedom of Communication and Transit, at Barcelona.<sup>4</sup> She was one of the members of the International Labour Organization and, in 1920, she put forward a claim to be included in the Governing Body of the Organization on account of her 'industrial importance'.<sup>5</sup> She ratified some of the Labour Conventions in 1921<sup>6</sup> and thereafter several International Labour Organization Conventions.

Under the Government of India Act of 1919, a High Commissioner for India was then appointed in the United Kingdom for the first time. A Foreign and Political Department was functioning under the Governor General, the Foreign Department dealing with the adjacent countries and the tribal areas under a Foreign Secretary, up to 1937. In 1937, as a result of the *Government of India Act of 1935*, the Foreign and Political Department was reconstituted as the External Affairs Department and the Department of Indians Overseas, which since 1944 came to be known as the Commonwealth Relations Department.<sup>7</sup> An Agent-General for India was appointed in the Union of South Africa in 1927.<sup>8</sup> In 1941 an Agent-General for India was attached to the United Kingdom Embassy<sup>9</sup> in Washington and a United States Commissioner was appointed in New Delhi.

domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same, should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for the continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine'. Imperial War Conference, 1917, p. 43: Res. IX—Constitution of the Empire, quoted by Amos J. Peaselee, *International Governmental Organizations* (2nd edn., 1956), vol. 1, p. 299. In the Report of the Inter-Imperial Relations Committee of the Imperial Conference, 1926, the special position of India was stated as follows: 'It will be noted that in the previous paragraphs we have made no mention of India. Our reasons for limiting their scope to Great Britain and the Dominions is that the position of India in the Empire is already defined by the Government of India Act, 1919. We would, nevertheless, recall that by Resolution IX of the Imperial War Conference 1917, due recognition was given to the important position held by India in the British Commonwealth. Where, in this Report, we have had occasion to consider the position of India we have made particular reference to it'; Peaselee, *ibid.*, p. 301.

<sup>1</sup> *League of Nations Official Journal*, no. 1 (1920), pp. 11, 12. Lord Curzon, Secretary of State for Foreign Affairs, representing the British Empire, said in the first meeting of the Council of the League of Nations: 'It is upon the fact of nation-hood that it rests.' He added: 'The League is an association of sovereign States whose purpose is to reconcile divergent interests and to promote international cooperation in questions which affect or may affect the world at large', *ibid.*, p. 21. Lord Curzon had, however, no doubt about the fact that India was not a sovereign State at that time. Also see *After Partition* (Publications Division, Ministry of Information, Government of India, 1948), pp. 107-9; Harvey, *Consultation and Cooperation in the British Commonwealth* (2nd edn., 1952), p. 132; *Partition Proceedings* (Ministry of Law, Government of India, 1949), vol. 3, p. 214; Hyde, *op. cit.* (above, p. 204 n. 3), p. 55; Oppenheim, *op. cit.* (above, p. 204 n. 3), p. 190 n. 6.

<sup>2</sup> *League of Nations Official Journal*, no. 6 (1920), pp. 321-4; Harvey, *op. cit.* in the preceding note, p. 132.

<sup>3</sup> *League of Nations Official Journal*, no. 2 (1921), p. 233.

<sup>4</sup> *Ibid.*, no. 3 (May 1921), p. 290.

<sup>5</sup> *Ibid.*, no. 6 (1920), pp. 321-4.

<sup>6</sup> *Ibid.*, no. 8 (1921), p. 921.

<sup>7</sup> Harvey, *op. cit.* (n. 1 on this page), p. 132.

<sup>8</sup> *Ibid.*, p. 134.

<sup>9</sup> *Ibid.*, p. 135.

In fact, India even possessed the treaty-making power as a separate entity with the tacit understanding of Great Britain. As pointed out by McNair:

India is in a special position. She was excluded from the 1926 statement of the relations of the different parts of the British Commonwealth. . . . But she is a member of the League of Nations and concludes treaties in substantially the same manner as any of the self-governing Dominions. . . . Thus Newfoundland and Southern Rhodesia which internally are completely self-governing, have no treaty-making power or special international status, while India which is not completely self-governing nevertheless has. The criterion is really international recognition.<sup>1</sup>

It was by virtue of this distinct international personality that in 1947, when India gained her political independence, she was considered as a party to 627 treaties, conventions, agreements, etc., and a member of fifty-one international organizations.<sup>2</sup>

### *The anomalous character of India's international personality*

But it may be pointed out that India was not functioning independently in external matters. She was completely under the control of the British Colonial and Foreign Offices. All her correspondence with the League of Nations was conducted through the Secretary of State for India.<sup>3</sup> Great Britain insisted that the League Membership should be kept open to 'Dominions and Colonies' in order to admit the British Dominions and India.<sup>4</sup> Although this move eventually resulted in securing India's position in the comity of nations, Great Britain was then motivated only by considerations of political gains and weightage of votes in the League. So long as India and the Dominions remained integral parts of Great Britain, the situation was anomalous. Hence the British attempt to get the Dominions and India admitted to the League was severely criticized by the United States. In the Lodge Reservations to the United

<sup>1</sup> McNair, *The Law of Treaties, British Practice and Opinions* (1938), p. 67; see also pp. 75-6.

<sup>2</sup> *Partition Proceedings* (1949), vol. 3, Annexures V, VI, pp. 217-79; *After Partition* (1948), pp. 107-9.

<sup>3</sup> See, for instance, the following letter (*League of Nations Official Journal*, no. 4 (1921)):

*'Reply of the Government of India*

India Office

Whitehall, S.W.1.

J. & P. 1805

April 27th, 1921.

The Secretary of State for India presents his compliments to the Secretary-General of the League of Nations and has the honour to acknowledge the receipt of his letter of March 8th, 1921 (21/31/27) enclosing the recommendation adopted by a majority vote of the Assembly with regard to the limitation of military, naval and air expenditure during the two financial years following. The Secretary of State is in correspondence with the Government of India as to the recommendation in question and hopes to be able to reply to the Secretary-General's enquiry without undue delay, but regrets that in the meantime he is not in a position to supply the information requested before May 1st, 1921.

The Secretary-General,  
The League of Nations,  
Geneva.'

<sup>4</sup> 'The members of the Covenant, in their attempt to create a political organization into which the British Empire would fit, used the same phrase "State, Dominion or Colony",' this *Year Book*, 9 (1928), p. 85. See also Art. 1 (1) of the League Covenant: 'The original Members of the League of Nations shall be those Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant.' Art. 1 (2) states: 'Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly . . .', *League of Nations Official Journal*, no. 43 (1921), Special Supplement, p. 10.



States ratification of the Treaty of Versailles, American opposition was most openly expressed:

The United States assumed no obligation to be bound by any election, decision, report, or finding of the council or assembly, in which any member of the League and its self-governing dominions, colonies, or parts of empire, in the aggregate have cast more than one vote, and assumes no obligation to be bound by any decision, report, or finding of the council or assembly arising out of any dispute between the United States and any member of the League if such member or any self-governing dominion, colony, empire or part united with it politically has voted.<sup>1</sup>

Similarly, the *Majority Report of the Committee on Foreign Relations (U.S.A.)* stated as follows about India's membership in the League of Nations:

Great Britain now has under the name of the British Empire one vote in the Council of the League. She has four additional votes in the Assembly of the League for her self-governing dominions and colonies which are most properly members of the League and signatories to the treaty. She also has the vote of India, which is neither a self-governing Dominion nor a Colony but merely a part of the Empire and which apparently was simply put as a signatory and member of the League by the peace Conference because Great Britain desired it.<sup>2</sup>

<sup>1</sup> *Congressional Record*, vol. 58, 66th Congress, 1st Session, pp. 8777 et seq. A U.S. Senator quoted an editorial from the *Grand Rapids (Mich.) Herald*: 'One of Great Britain's six votes in the pending League of Nations is assigned to India. To thus qualify for independent League membership India must be a "fully self-governing colony," under the language of the Covenant itself. By what stretch of the imagination can any candid analyst assign India to any such status? True there is a certain freedom in administrative matters allowed to native chiefs. But "the supreme government can exercise any degree of control it may wish" says the Statesman's Yearbook. This supreme government is exclusively and omnipotently British. The Secretary of State for India, a Briton, selects a Council of Britons. The expenditure on the revenues of India, both in India and elsewhere, is subject to the Council. "In dealing with questions affecting the relations of the Government with foreign powers," says the Statesman's Yearbook "and in making peace and war and in prescribing the policy of the Government towards native States and in matters of internal policy, the Secretary of State may act on his own authority. The Emperor of India is the King of England. The Supreme Executive authority in India is vested in a British Viceroy; appointed by the British Crown. That India is not fully self-governing, either as required by the League Covenant in order to justify independent League membership, or even as in other British Dominions like Canada, etc. is apparent on the face of things. . . . We are making this point because of its potent bearing upon the structure of the proposed League of Nations and our proposed relationship to this new international fraternity. . . . There may prove to be some elements of independent self-decision in League votes which may be cast by other British Dominions like Canada, etc., but a League vote for India is absolutely and completely a second League vote for England—absolutely and exclusively under British control. When other British colonies signed the preliminary Covenant they signed through native statesmen. When India signed, she signed through "The Right Honourable Edwin Montagu, Member of the British Parliament, and the King's Secretary of State for India." Montagu spoke and acted for India. The Maharaja of Bikaner, who signed below was only a rubber-stamp, because these native princes are specifically barred from peace-making authority . . . England signed for India and by the same token England will vote for India whenever a League referendum is to be taken;' *ibid.*, p. 6317. Also see, pp. 5971-3, 7358, 7491; and vol. 59, p. 4012. President Wilson, in a speech at Cheyenne Wyo, referred to India's vote and said: 'The only other vote given to the British Empire is given to that hitherto voiceless mass of humanity that lives in that region of romance and pity that we know as India. I am willing that India should stand up in the Councils of the world and say something;' *ibid.*, p. 6420; also see p. 6425. Whatever be the President's sympathy for India, the fact, that India's foreign relations were completely under the control of the British Foreign Office, reduced the membership to a mere fiction. Even the Senators' criticism was not because they were against India, but because of this fiction; see *ibid.*, vol. 58, p. 7501; and vol. 59, p. 4012.

<sup>2</sup> (1919), p. 4.

As Benjamin Akzin said :

Indeed, at times, it seems as if the placing of an entity under the heading of 'States' or of territories other than States, for the purpose of making it eligible for membership in an inter-governmental organization at any rate, is dictated by political and prestige considerations, pure and simple.<sup>1</sup>

The anomaly becomes far more glaring if one looks at the constitutional position of India in the British Empire. As one author wrote :

The name of British Empire has a meaning in international law. It is a real unit for international purposes. It is capable of fulfilling functions of international concern. And the British Empire includes every part of a single and united realm over which the King holds sway, whether it be Great Britain, the self-governing Dominions, or the Crown colonies and other colonial possessions.<sup>2</sup>

Till the end of the nineteenth century, this practice of the British Empire to act as the only rightful international person was unquestionable. The Anglo-Japanese Treaty, the Anglo-French *entente*, and the Conventions of the first and second Hague Conferences were signed by Great Britain only. Even as late as 1911 the official view of the Imperial Government, as stated by Asquith at the Imperial Conference, was that 'the authority of the Government of the United Kingdom in such grave matters as the conduct of foreign policy, the conclusion of treaties, the declaration and maintenance of peace or the declaration of war cannot be shared.'<sup>3</sup> But the First World War, and the contribution made by Australia, Canada, Ireland, New Zealand, South Africa and India in winning the war exercised a profound influence on the British attitude towards the Dominions' claim for external autonomy on which they had been insisting for years. This was one of the reasons why, at the Peace Conference in Paris, Great Britain pressed for their admission to the League of Nations.<sup>4</sup> Even though the Dominions were not autonomous externally when the Treaty of Versailles was signed, their membership of the League of Nations did not create such an anomalous situation as in the case of India. As far as the Dominions were concerned the principle of independence in external relations was soon accepted by the *Balfour Committee Report*.<sup>5</sup> It defined in 1926 the status of the Dominions in the British Commonwealth, as follows :

They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.<sup>6</sup>

Statutory effect was given to this principle in 1931. Section 1 of the Statute of Westminster stated :

In this Act the expression 'Dominion' means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.<sup>7</sup>

<sup>1</sup> *New States and International Organizations* (1955), p. 13. According to Dickinson, this irregularity was perpetuated only 'to give the greater colonial powers a larger representation in League institutions than is accorded to other States', *The Equality of States in International Law* (1920), p. 366.

<sup>2</sup> P. J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law* (1929), p. 360.

<sup>3</sup> *Ibid.*, pp. 47-8.

<sup>4</sup> Lanka Sundaram, *India in World Politics* (1944), pp. 11-17.

<sup>5</sup> *Cmd.* 2768, pp. 13-30.

<sup>6</sup> *Ibid.*, p. 14.

<sup>7</sup> 22 Geo. 5, C. 4 (11 December 1931); see also Wheare, *The Statute of Westminster and Dominion Status* (2nd edn., 1942), p. 334.



What made India's position anomalous was the fact that after getting India admitted to the League of Nations, Great Britain still controlled her external relations.<sup>1</sup> From the point of view of constitutional law, India was still regarded as 'an integral part of the British Empire'.<sup>2</sup> A. B. Keith observed:

The justification for League membership was autonomy, it could fairly be predicated of the Great Dominions; of India it had no present truth, and it could hardly be said that its early fulfilment was possible. In these circumstances it would have been wiser candidly to admit that India could not be given then a place in the League, while leaving it open for her when autonomous to be accorded distinct membership. . . . As it is, in the League India's position is frankly anomalous, for her policy is determined and is to remain determined indefinitely by the British Government.<sup>3</sup>

While the Dominions enjoyed freedom of action with respect to policy matters affecting them in the League as well as in other international organizations, India did not have much say on major policy matters or political questions affecting her or the British Empire.<sup>4</sup> Except for the formal equality and the freedom to discuss political or technical issues, India, unlike the Dominions, had been completely subordinated to the British Government. While other delegations to the League of Nations spoke the views of their peoples who were free, the Indian delegation expressed the views of a foreign government which ruled India, and not those of a free people. So long as India was regarded as an integral part of Great Britain all other claims, such as that Indians were leading the Indian delegation to the League meetings, that India played a prominent part in the International Labour Organization as one of the eight industrially important States, or that Indian delegates were vested with plenipotentiary powers, lost much of their meaning.<sup>5</sup>

It was only by virtue of India's original membership in the League of Nations that she obtained the original membership in the United Nations which otherwise admitted only sovereign States.<sup>6</sup> Except for Byelo-Russia and Ukraine, India was the only non-sovereign State in the United Nations. India was still under British rule when she

<sup>1</sup> Lanka Sundaram, op. cit. (above, p. 208 n. 4), p. 27; also see his paper 'International Status of India', *Journal of the Royal Institute of International Affairs* (July 1930), and his address on 20 March 1931, published in the *Transactions of the Grotius Society*, 17 (1931), pp. 35-54.

<sup>2</sup> Government of India Act, 1919 (9 & 10 Geo. 5 Chr. 101); V. P. Menon, *The Transfer of Power* (1957), p. 16.

<sup>3</sup> *Constitutional History of India, 1600-1935* (1936), p. 473.

<sup>4</sup> Noel Baker, op. cit. (above, p. 208 n. 2), pp. 13-14; Lanka Sundaram, op. cit. (above, p. 208 n. 4), pp. 36, 38.

<sup>5</sup> Motilal Nehru wrote: 'The bigger questions of policy having an imperial aspect, are settled not in India, but in England.' See *All Parties Conference, Report of the Committee Appointed by the Conference to Determine the Principles of the Constitution of India* (1928), pp. 85-6. Pandit Motilal Nehru (All India Congress Committee, Allahabad) was the Committee's chairman.

<sup>6</sup> *The Moscow Declaration*, Section 4, stated as follows about United Nations Membership: 'That they recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security.' *Department of State Bulletin* (U.S. Government Printing Office), vol. 9, pp. 307 et seq. Article 3 of the United Nations Charter states: 'The original Members of the United Nations shall be the States which, having participated in the United Nations Conference on International organization at San Francisco, or having previously signed the Declaration by the United Nations on January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.' See further, Article 4 (1): 'Membership in the United Nations is open to all other peace-loving States', and Article 4 (2): 'The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.' *United Nations Conference on International Organization: Documents*, vol. 15, pp. 223 et seq.



signed the United Nations Declaration in 1942 and the Charter in 1945. India did not enjoy the right to declare war either during the First or the Second World Wars. India became automatically a belligerent State, when Britain declared war.

India's membership of the League of Nations, the United Nations, their Specialized Agencies and other inter-governmental international organizations; her active participation in international conferences; her treaty-making capacity; none of these can be properly understood without taking into account this background of extreme limitations imposed on her sovereignty by the United Kingdom Government through direct control of her foreign relations right up to 1947. The Dominion status, which marked the beginning of internal and external sovereignty, was given to India only in 1947.

Therefore, the uncritical view generally prevailing, that what happened in India in 1947 with the adoption of the Indian Independence Act was merely a constitutional change to introduce another form of government of an already existing State, seems to be unsatisfactory.

*India's anomalous international personality and its significance to international law*

It is not merely what has been technically described as a change in the form of government but also a change in the substance of government.<sup>1</sup> The Sixth Committee of the General Assembly of the United Nations admitted this when it observed that the Indian Independence Act 'has effected a basic constitutional change in India' and consequently India 'has a new status in the British Commonwealth of Nations, independence in external affairs and a new form of government'.<sup>2</sup> It is the transformation of a part of the British Empire into a State fully *sui juris*. The difference is, therefore, more fundamental; it is the difference between an independent State and a dependent State. As Brierly says, 'the proper usage of the term "independence" is to denote the status of a State which controls its own external relations without dictation from other States. . . .'<sup>3</sup> In sum, when one views the whole series of developments from 1919 to 1947, the conclusion is inescapable that 'there cannot be relative degrees of independence, though there may be varying stages of emancipation'.<sup>4</sup>

However, expert opinion viewed the whole question differently for technical reasons. In order to give credibility to the continuity of India's international personality, this profound change—of far-reaching consequence in India—was simply dismissed as of no consequence to international law.<sup>5</sup> Referring to the change in India in 1947, the Steering Committee of the Partition Council said: 'A change in the form of Government does not in any way alter the international personality of a State. A community is able to assert its rights and to fulfil its duties equally well whether it is presided over by a dynastic ruler or whether it is clothed with a form of a monarchy or a republic.'<sup>6</sup> In reply to Pakistan's claim for original membership in the United Nations, the Sixth Committee expressed the view that a member *State* of the United Nations 'does not cease to be Member simply because its constitution or its frontier has been sub-

<sup>1</sup> According to one author, 'the quantum of change introduced by Dominion status in the personality of India is so great that it would be more accurate to describe her as constituting a new international person after 1947'. See T. S. Rama Rao, 'Some Problems of International Law in India', *Indian Yearbook of International Affairs*, 6 (1957), p. 9.

<sup>2</sup> U.N. Doc. A/C. 6/162 (Annex 6b), *General Assembly, Official Records (G.A.O.R.)*, 6th Committee, pp. 307-8.

<sup>3</sup> Brierly, *The Law of Nations* (6th edn., 1963), p. 129.

<sup>4</sup> Manfred Natham, 'Dominion Status', *Transactions of the Grotius Society*, 8 (1923), p. 124.

<sup>5</sup> B. N. Rau, *India's Constitution in the Making* (1960), p. 416.

<sup>6</sup> *Partition Proceedings* (Government of India, 1949), vol. 3, p. 290.

jected to changes . . .'.<sup>1</sup> According to the legal opinion of Ivan Kerno, then Assistant Secretary General of the United Nations, 'there is no change in the international status of India; it continues as a *State* . . .'. After referring to the separation of Pakistan from India, he continued: 'In international law, the situation is analogous to the separation of the Irish Free State from Britain and Belgium from the Netherlands. In these cases the portion which separated was considered a new State, and the remaining portion continued as an existing State with all the rights and duties which it had before.'<sup>2</sup>

In international law the distinction between a dependent State and an independent State is still maintained. In theory, there is substantial and functional difference between the international personality of a dependent State and of an independent State. There was never any doubt about the fact that India was a dependent State till 1947. Yet to treat such an entity as though it was a State was certainly inappropriate.

Similarly, the recognition accorded to India prior to 1947 is not to be confused with the formal recognition of a government or a State. Nothing of that kind ever took place. Third States, while dealing with India through Britain tacitly agreed to her participation in international conferences, to her right to conclude treaties and to her membership of international organizations. That was the beginning of India's limited but anomalous international personality. This again refutes the assumption that India was already a State for purposes of international law.

A change in the form of government presupposes the existence of a State because a government is, according to the simple political maxim, an element of a State. One cannot conceive of the existence of a State in a colonial or dependent territory unless it attains political independence. This may be possible in the case of protected States and protectorates. Strictly speaking, the term State is a misnomer in the case of dependent areas which are advancing towards statehood. If they have any form of government at all, it is only the colonial form of administration. In their case the metropolitan State is the real State. A change in the form of government becomes relevant only when the colonial administration changes. There cannot be a government without a State. When the colonial or dependent area emerges into a sovereign State, its government comes into existence. Only then does it make sense to talk of a change in the form of government from monarchy to republic. In any case, there can be no comparison between the change of government from monarchy to republic in France or Russia and the change in the so-called 'form of government' which India was undergoing till 1947.

Finally, the separation of Pakistan from India is not quite similar to the separation of the Irish Free State from Britain or Belgium from the Netherlands. The analogy given by Rau, Constitutional Adviser to India in 1947, was equally wrong. In all these cases the separation was from an already existing and independent State, which was not true of India. In fact, there was serious controversy about this question. The Indian National Congress suggested to the British Government in 1946 that instead of a single bill providing simultaneously for Indian independence and the separation of Pakistan, two bills should be introduced in the British Parliament, first one for the setting up of India as an independent State, and afterwards the other for the separation of Pakistan from India.<sup>3</sup> The proposal was not acceptable to the British Government.

<sup>1</sup> U.N. Doc. A/C. 6/162, *G.A.O.R.*, 6th Committee, pp. 307-8.

<sup>2</sup> *U.N. Weekly Bulletin*, 3 (1947), no. 8, p. 261 (italics added). It is not merely Ivan Kerno who made this type of comparison. B. N. Rau, Constitutional Adviser to the Government of India in 1947, compared the separation of Pakistan from India to that of Sweden from Norway and Iceland from Denmark, *op. cit.* (above, p. 210 n. 5), p. 419.

<sup>3</sup> V. P. Menon, *Transfer of Power* (1957), Appendix XI.

Although the tenor of the British<sup>1</sup> and Indian<sup>2</sup> official explanation before and after the adoption of the Indian Independence Act, 1947, was that India should be treated as the parent State and Pakistan its successor State, there were some contradictions and controversy about the whole question. The Indian Independence Act, 1947, stated in Section 2 (1) that 'two independent Dominions shall be set up simultaneously in India to be known respectively as India and Pakistan'.<sup>3</sup> While explaining this Act to the British Parliament Mr. (afterwards Lord) Attlee observed that India and Pakistan were two successor States.<sup>4</sup> Pakistan propounded the 'co-successor' theory and claimed that she should be treated as an original member of the United Nations along with India, whose international personality disappeared in 1947.<sup>5</sup> Her claim was supported by Chile, Australia, Argentina, Haiti, Philippines, Egypt, Iraq, El Salvador, etc. These bare facts prove the untenability of the analogy.

From the theoretical point of view what happened in 1947 was, therefore, the transformation of the limited personality of India into a full-fledged and normal international personality. This is, indeed, important to international law. It shows how limited international persons appear in international law without formal recognition either as a State or as a government. It also shows that when such an entity matures into a normal subject of international law, it becomes entitled to *all* the rights and duties of international law (instead of *limited rights* and *limited capacity*). It is possible, and it happens quite often, that its pre-existing rights as a limited international person might be regularized retroactively. This would avoid a legal vacuum and ensure continuity and stability to legal rights and obligations. Implied in this process of transformation is the reversion to, or acquisition of, sovereignty *in toto*. Protectorates and protected States regain their suppressed sovereignty and dependent States reach the plenitude of their sovereignty. In other words, its significance for international law is that it establishes the emergence of a sovereign independent State<sup>6</sup> with the fullness and equality of rights and duties under international law.

<sup>1</sup> V. P. Menon, *Transfer of Power* (1957), Appendix XI, p. 391.

<sup>2</sup> *Partition Proceedings* (Government of India, 1949), vol. 3, pp. 206, 289-91, 292.

<sup>3</sup> 10 & 11 Geo. VI, c. 30.

<sup>4</sup> *Hansard*, H.C., vol. 440, 14 July 1947, col. 44.

<sup>5</sup> U.N. Doc. A/399, *G.A.O.R.*, 2nd Session, 30 September 1947, pp. 317-18.

<sup>6</sup> Rau, in his Note on Bhutan's status and on Indo-Bhutanese relations after 1947, suggested that Bhutan should recognize 'India as an independent sovereign State'. He included a provision to this effect in 'An Indo-British Treaty' which was designed to serve as a model treaty; *op. cit.* (above, p. 210 n. 5), pp. 372, 394.



# DECISIONS OF BRITISH COURTS DURING 1969–1970 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

## A. PUBLIC INTERNATIONAL LAW\*

*Recognition—hostilities with any ‘foreign State’—Patents Act, 1949, s. 24 (1)—unrecognized State—North Korea*

*Case No. 1. In re Al-Fin Corporation’s Patent*, [1970] 1 Ch. 160, Graham, J. Section 24 (1) of the Patents Act, 1949, provides in part as follows: ‘If upon application made by a patentee in accordance with this section the court or the comptroller is satisfied that the patentee as such has suffered loss or damage (including loss of opportunity of dealing in or developing the invention) by reason of hostilities between His Majesty and any foreign State, the court or comptroller may by order extend the term of the patent. . . .’

The applicants, the Al-Fin Corporation, were the owners of British letters patent relating to the use of ferrous metal incorporated in pistons which require the use of nickel in their manufacture. The applicants had applied to the comptroller for an extension of the term of the patent within the terms of section 24 (1) on the ground of war loss due to hostilities between His late Majesty and the Democratic People’s Republic of Korea (North Korea) during the period 25 June 1950, until 27 July 1953. It was alleged that as a consequence of these hostilities nickel was in short supply in the United Kingdom and the applicants suffered loss in not being able to enjoy the full benefit of the patent.

Before the application to the comptroller had been determined, the applicants formed the view that an adverse decision was inevitable in the light of the decision of the comptroller in a previous case, *Harshaw Chemical Co.’s Patent*, [1965] R.P.C. 97. In that case it had been held that the Korean conflict did not constitute hostilities within the meaning of section 24, and, further, that the shortage of nickel at the material time was not caused by the hostilities. Consequently the owners of the patent applied to the High Court for a declaration whether, on a true construction of section 24 of the Patents Act, 1949, North Korea was a ‘foreign State’ within the meaning of section 24 (1) at the time of the Korean war. Graham J. concluded that the court had no power to make the declaration asked for, applying considerations not material for the present purpose. With the agreement of the parties his lordship then dealt with the question whether North Korea was a ‘State’ within the meaning of section 24 as a preliminary point in the hearing of the application referred to the court under section 24 (2).

There was before the court a letter from the Foreign Office in reply to a question jointly submitted by the parties. The material parts of the letter are as follows:

2. The questions were in the following terms:

‘What (a) States or (b) Governments or (c) Authorities, if any, were between June 25, 1950 and July 27, 1953, inclusive recognized by Her Majesty’s Government as

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(a) entitled to exercise or (b) exercising governing authority in the area of Korea north of the 38th parallel? Has such recognition been *de facto* or *de jure*?'

3. I am to inform you that between June 25, 1950 and July 27, 1953, His/Her Majesty's Government did not recognize the existence of an independent sovereign State in the area of Korea north of the 38th parallel either *de facto* or *de jure*, and did not recognize any authority exercising control in that area as a Government either *de facto* or *de jure*.

4. So far as the existence of authorities is concerned, this is considered to be a question of fact but Her Majesty's Government are aware that between June 25, 1950 and July 27, 1953, there were certain authorities styling themselves 'The Government of the Democratic People's Republic of Korea' exercising control over the above-mentioned area.

5. I am to add that, in providing the above information the Foreign Office is expressing no view as to whether there were 'hostilities between His Majesty and any foreign State' within the meaning of section 24 of the Patents Act, 1949, which is regarded as a question for determination by the court on the basis of all the relevant evidence and in the light of the true interpretation of the Statute.

Graham J. referred<sup>1</sup> with approval to the decision of Sellers J. in *Luigi Monta of Genoa v. Cechofracht Co. Ltd.*,<sup>2</sup> a case involving the construction of a charterparty, in which the learned judge held that there was no rule of law restricting the evidence to be considered to that provided by the Foreign Office. In the present case his lordship observed that 'the general principle must be that the true intention of the document, whether it be a commercial document or a statute, is to be ascertained', and went on to hold that North Korea was a foreign State within the meaning of section 24 and, accordingly, that the *Harshaw* case was wrongly decided. The phrase 'any foreign State' was thus not limited to a foreign State which had been given Foreign Office recognition:

'It must at any rate include a sufficiently defined area of territory over which a foreign government has effective control. Whether or not the State in question satisfies these conditions is a matter primarily of fact in each case and no doubt there will be difficult cases for decision from time to time, but difficult cases of fact do not prevent the court from coming to a conclusion when the relevant facts are proved before it.'

His lordship distinguished the decision in *In re Mangold's Patent*.<sup>3</sup> In that case it was held that after the annexation of Austria and the later outbreak of hostilities between Germany and the United Kingdom, a former Austrian citizen became a German citizen and therefore an enemy for the purposes of section 24 (8) of the Patents Act, in spite of his being resident in the United Kingdom from 1937 onwards.

The decision of Graham J. makes good sense, and the case is similar not only to the *Luigi Monta* decision but also to *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S.S. Co.*,<sup>4</sup> another case in which the Foreign Office left the court to take its own view on a basis of interpretation and function. Whilst the Foreign Office Certificate in the present case is non-committal to a degree, it does refer as a question of fact to 'certain authorities . . . exercising control' over North Korea. It may be recalled that, even in the rather political sphere of sovereign immunity such 'de factoism' divorced from political recognition may lead to significant legal consequences, witness the certificate and the decision of the House of Lords in *The Arantzazu Mendi*.<sup>5</sup>

<sup>1</sup> At pp. 179-80.

<sup>2</sup> [1956] 2 Q.B. 552.

<sup>3</sup> (1950), 68 R.P.C. 1. For criticism of this unsatisfactory decision see the present writer, 86 J.D. I. (1959), pp. 1168-70.

<sup>4</sup> [1939] 2 K.B. 544, which concerned the term 'war' in a charterparty.

<sup>5</sup> [1939] A.C. 256.

In the present case his lordship remarked that 'the phrase "any foreign State", although of course it includes a foreign State which has been given Foreign Office recognition, is not limited thereto'. With respect, on its face this statement is not consistent with his own reasoning, since presumably the case could arise in which there was evidence which conflicted with the view of the evidence on which the grant of recognition had been based.

*Diplomatic immunity—private residence of diplomatic agent—request to executive of host State to evict person from residence.*

*Case No. 2. Agbor v. Metropolitan Police Commissioner*, [1969] 2 All E.R. 707, C.A. This was an appeal by Margaret Agbor, the plaintiff, from a refusal to grant *ex parte* an order that the plaintiff be restored to possession of certain premises in London and that the Commissioner of the Metropolitan Police, the defendant, should be restrained from delivering possession of these premises to any other person.

The premises involved were a house purchased by the government of the Eastern Region of Nigeria. After the outbreak of civil war in Nigeria an officer of the Republic of Biafra occupied the first floor, whilst the ground floor was occupied by a member of the diplomatic staff of the Federal Government of Nigeria. This latter officer decided to leave the premises and did so. After he had left, a party of Biafrans installed Mrs. Agbor and her family on the ground floor. The Nigerian High Commission chose not to take proceedings in the courts to evict Mrs. Agbor. Instead, police acting with the authority of the Home Office on behalf of the Nigerian Government evicted her. The move stemmed from a formal request by the Nigerian High Commission to the Foreign and Commonwealth Office in which reference was made to Article 30 of the Vienna Convention on Diplomatic Relations, contained in Schedule 1 of the Diplomatic Privileges Act, 1964. This provides that: 'The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.'

Article 22 of the Convention provides that the premises of the mission shall be inviolable and, in the second paragraph, that 'the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity'.

The Court of Appeal found on the evidence that at the material time the house was not the residence of a diplomatic agent, since the officer occupying the ground floor had left for good, and, further, that Mrs. Agbor was in possession under a claim of right made in good faith. The police had acted at the request of the Home Office who were acting under a mistaken belief that the premises were the private residence of a diplomatic agent. Therefore, without the concurrence of Winn L.J. who had qualms about deciding on the matters at issue on an interlocutory application, the Court of Appeal made an interim order that the plaintiff be restored to possession.

Both Lord Denning M.R. and Salmon L.J. expressed the view that the Act of 1964 did not give to the executive any right to evict a person in possession who claims as of right to be in occupation of the premises. In other words, in the United Kingdom such a course could not be regarded as 'appropriate steps' to protect premises against any intrusion within the terms of Article 22 (2) of the Convention as incorporated into domestic law.

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## B. PRIVATE INTERNATIONAL LAW\*

*The proper law of a contract and the curial law of an arbitration*

*Case No. 1. Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.*<sup>1</sup> is a case of some importance in private international law. The *ratio decidendi* pertains to the determination of the curial law of an arbitration. At the same time the judgments of their lordships contain illuminating dicta upon the method of determining the proper law of a contract. Quite apart from this, the course of the litigation, which culminated in the House of Lords decision under discussion, provides an interesting statistic for students of the operation of multi-level appellate hierarchical structures. A Queen's Bench Master found that an Arbitrator had erred. An appeal from this finding was allowed by the Judge. The Court of Appeal unanimously reversed the Judge's holding and restored the Master's Order. Their lordships' House in its turn unanimously reversed the Court of Appeal and restored the Order of the Judge.

The facts must be stated in some detail. A contract was entered into in 1965 between an English company and a Scottish company by which the latter agreed to carry out certain conversion work at the former's factory in Scotland. The agreement was embodied in the then standard form Royal Institute of British Architects' contract. At that time this form was not specially adapted for use in Scotland, although there was in common use a Scottish form of contract drawn up by a different professional body. The contract entered into contained an arbitration clause: this provided that any dispute arising out of the contract should be referred to the arbitration of a person to be agreed, or, failing agreement, to be appointed by the President of the R.I.B.A. The contract was finally concluded in Scotland, but an English architect was appointed to supervise the work. Later a dispute arose, and the Scottish company applied to the President of the R.I.B.A. to appoint an arbitrator. This he duly did, the appointee being a Scottish architect practising in Scotland. The arbitration, in which both parties participated, was held in Scotland and followed normal Scottish arbitral procedures. Points of law arose, and at this stage the English company asked the arbitrator to state his award in the form of a special case for decision by the English High Court. The arbitrator refused this request on the ground that the arbitration was a Scottish arbitration. He subsequently issued his final award in favour of the Scottish company. According to Scots law the arbiter (arbitrator) had acted correctly for he is the final judge of law as well as of fact. By contrast, an English arbitrator is bound to state a case in order that questions of law which have arisen may be decided by an English court. The English company applied in England for an Order that the arbitrator should state his award according to English rules in the form of a special case. The Court of Appeal having held that the proper law of the contract was English and that the arbitration was governed by English law, the Scottish company appealed to the House of Lords. Their lordships' House divided three to two on the question of the identification of the proper law of the contract but was unanimous in holding that the curial law of the arbitration was the law of Scotland. The arbitrator was, therefore, correct in refusing to state his award in the form of a special case for the decision of the English High Court and in himself making a final award.

Earlier authority upon the method of determining the law to govern arbitration

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<sup>1</sup> [1970] A.C. 583.

proceedings is sparse. It is now perhaps possible to cull the following propositions from the judgments in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*: (1) The parties may choose the law which is to govern the arbitration proceedings. (2) In doing so they may choose a law different from the proper law of the contract. (3) In default of choice by the parties, the governing law will, anyhow *prima facie*, be the law of the place in which the arbitration is conducted.

Lord Reid, a member of the minority of their lordships who held that the proper law of the contract was Scots law, said, 'But if the proper law of the contract is the law of England, I think that the action of the parties after the appointment of Mr. Underwood [the arbitrator] sufficiently shows an agreement that the arbitration proceedings should be governed by the law of Scotland.'<sup>1</sup>

Lord Hodson took the view that, whatever the proper law of the contract, 'the arbitration being admittedly a matter of procedure as opposed to being a matter of substantive law is on principle and authority to be governed by the *lex fori*, in this case Scottish law'.<sup>2</sup> His Lordship approved Professor Kahn-Freund's submission in Dicey and Morris, *Conflict of Laws*,<sup>3</sup> to the effect that: 'Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate *prima facie*, as being governed by the law of the country in which the arbitration is held, on the grounds that it is the country most closely connected with the proceedings.' Later in his judgment his Lordship said, 'stating a case is a procedural matter and the respondents cannot pick and choose from the various operations involved in Scottish procedure'.<sup>4</sup> Although Lord Hodson's primary reason for applying Scottish law seems to be that it was the *lex fori*, he did nevertheless say, 'Furthermore, the parties have, in my judgment, plainly submitted to the Scottish arbitration on the footing that Scottish procedure was to govern.'<sup>2</sup>

Lord Guest posed the question simply in terms of the intention of the parties and held: 'Where all the proceedings take Scots form and the arbiter plainly indicates that he is following Scots procedure, then, in the absence of any protest, the parties will, in my opinion, be taken to have agreed that the arbitration will be governed by the curial rules of Scotland.'<sup>5</sup>

Lord Dilhorne cited with approval a passage from Dicey and Morris,<sup>6</sup> which embodies the three propositions stated above. A part of this passage was similarly cited by Lord Wilberforce, who laid down that in principle it is possible for the law governing the arbitral procedure to be different from that governing the substance of a contract. His lordship pertinently pointed out that many arbitrations are conducted in England by English arbitrators on matters arising out of contracts, the proper law of which is foreign, and such arbitrations are in practice governed by the English Arbitration Act in procedural matters. His lordship continued,<sup>7</sup> 'The principle must surely be the same as that which applies to Court proceedings brought in one country concerning a contract governed by the law of another, and that such proceedings as regards all matters which the law regards as procedural are governed by the *lex fori* has been accepted at least since Lord Brougham's judgment in *Don v. Lippmann*'.<sup>8</sup> Lord Wilberforce did not expressly state that it is open to the parties to choose the law which governs arbitration proceedings. It would appear, however, that the fact of the parties' acquiescence in the application of Scottish procedure during the earlier

<sup>1</sup> Ibid., p. 605.

<sup>2</sup> Ibid., p. 606.

<sup>3</sup> (8th ed., 1967), p. 1048.

<sup>4</sup> [1970] A.C. 583, 607.

<sup>5</sup> Ibid., p. 609.

<sup>6</sup> *Conflict of Laws* (8th ed., 1967), pp. 1047-8.

<sup>7</sup> [1970] A.C. 583, 616.

<sup>8</sup> (1837) 5 Cl & F. 1.



stages of the arbitration proceedings was a significant factor in his lordship's acceptance of the applicability of the *lex fori* principle in the instant case.

Although many doubts have been resolved by the decision in *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.*, the question which is still perhaps open is the conclusiveness of the parties' intention as to what should be the curial law of an arbitration. It could be contended that there are at least some procedural matters to which the *lex fori* should be applied, quite regardless of the intention of the parties. The general tenor of the judgments, particularly those of Lord Hodson and Lord Wilberforce, seems to cater for this possibility. Suppose that—hypothetically to vary the facts of the case itself—after the President of the R.I.B.A. had appointed a Scottish architect as the arbiter, and the arbiter had himself appointed a Scottish solicitor as his clerk, it being understood that the arbitration proceedings were to take place in Scotland, the parties had then specifically agreed that the arbitration should be conducted entirely according to English procedures, severe practical difficulties would certainly have arisen. The rationale of the general private international law principle that matters of procedure are to be determined by the *lex fori* would appear to reach in many respects to arbitration proceedings. In a sophisticated conflict of laws jurisprudence, it might be provided that certain procedural matters should in the interests of convenience always be controlled by the *lex fori*, whereas the control of the *lex fori* over some other 'procedural' matters might depend upon the choice or at least acquiescence of the parties. There would be little doubt that the matter in issue in the *Whitworth Street Estates* case, namely the propriety of stating a special case to the High Court on a point of law, would fall into the latter category. No compelling consideration of practical convenience would seem to require that an arbiter sitting in Scotland should, invariably and without regard to any agreement of the parties to the contrary, adhere to Scottish practice in this particular regard.

In the light of their lordships' unanimity in holding that, whatever the proper law of the contract, the curial law of the arbitration was the law of Scotland, their observations upon the determination of the proper law of a contract must probably be regarded technically as *obiter dicta*: they are nevertheless of importance. Four points may be mentioned.

1. All five of the Law Lords appear to have accepted as a starting-point the basic freedom of parties to a contract to choose the law which will govern it. Had the contract in the *Whitworth Street Estates* case contained a term to the effect that English law (or that Scots law) should govern, there can be no doubt that all their lordships would have treated this as conclusively determining the proper law of the contract. It is true that Lord Reid does mention that the general entitlement of parties to choose the proper law may be subject 'to some limitations'.<sup>1</sup> The nature of these limitations is not revealed, but there is no suggestion that they might be relevant in the case before their lordships. Indeed the judgments are marked by an apparently unquestioning and mostly unqualified acceptance of the autonomy of the parties. On the other hand, this must, it is submitted, be seen against the general background of the facts of the case. These facts were significantly linked with England and with Scotland but with nowhere else. No suggestion had been made that the proper law could be any law other than English or Scots. However, had the parties expressly chosen the law of a third country having no (or even little) connection with the contract to govern, might not a more guarded approach to the principle of autonomy have been adopted?

<sup>1</sup> [1970] A.C. 583, 603.



This question would become more pressing if, in the hypothetical circumstances envisaged, acceptance of the parties' choice would open up the way to permitting them to evade some mandatory requirement of both English and Scots law.

2. In accepting the doctrine of autonomy there would seem to be no legitimate reason of principle for discriminating between cases in which the parties' choice is express and those in which, although unexpressed, it is otherwise clear. This is emphasized by Lord Reid<sup>1</sup> and generally accepted.<sup>2</sup> Clarity, however, especially when applied to intention, is a somewhat subjective notion, and it is at this point that uncertainty may begin to manifest itself. The *Whitworth Street Estates* case itself provides an illustration. Lord Hodson said, 'the question is, to my mind, determined by the use of the English form, the selection of which shows the intention of the parties to be bound by English law'.<sup>3</sup> So, too, Lord Dilhorne said, 'in my opinion, the conduct of the parties at the time the contract was entered into shows that despite the fact that the work was to be done in Scotland both parties intended that the contract should be governed by the law of England'.<sup>4</sup> On the other hand, Lord Guest, who like Lord Hodson and Lord Dilhorne reached the conclusion that English law was the proper law, had 'no doubt that the parties never chose English law as the proper law of the contract or evinced any intention to be bound by this law'.<sup>5</sup> So, too, Lord Reid found no adequate evidence of any implied agreement by the parties that English law should govern.

3. If the parties' intention is not expressed and cannot realistically be inferred, resort must perforce be had to an objective test: the law to be applied in such circumstances is the law with which the transaction has its closest and most real connection or the law of the country with which it has its closest and most real connection. Lord Reid drew attention to the distinction<sup>6</sup> between these two formulations of the 'objective test' but held both to be of value: 'In the present case the form of the contract may be said to have its closest connection with the system of law in England but the place of performance was in Scotland and one must weigh the relative importance of these two'.<sup>7</sup> The transaction, particularly having regard to its form and terminology, was intimate with English law. The contractor was, however, Scottish, and all the work to be done under the contract was to be done in Scotland: Scotland was, therefore, the country with which it was most closely connected.

It is submitted that so long as the inquiry is as to the intention of the parties, the connection with a law or legal system is dominant. If, however, there is no adequate evidence to suggest that the parties had any particular governing law or legal system in mind and resort is therefore had to a purely objective test, it is (almost *ex hypothesi*) connection with a country that is to be investigated. It is in this context that those of their lordships who were unable to discern any clear intention on the part of the parties in the *Whitworth Street Estates* case attached great importance to the fact that it was in Scotland that the performance of the contract was to take place.<sup>8</sup>

4. Four<sup>9</sup> of the Law Lords emphasized that, in construing the intention of the

<sup>1</sup> *Ibid.*, p. 603.

<sup>2</sup> But see Lord Wilberforce's formulation at p. 614.

<sup>3</sup> *Ibid.*, p. 606.

<sup>4</sup> *Ibid.*, p. 611.

<sup>5</sup> *Ibid.*, pp. 607-8.

<sup>6</sup> Cf. Lord Hodson who did not 'see that this variation of language is important, although in some contexts one word may be more appropriate than another' (*ibid.*, p. 606).

<sup>7</sup> *Ibid.*, p. 604.

<sup>8</sup> See Lord Reid at p. 605, Lord Guest at p. 608 and Lord Wilberforce at p. 615. See, too, to the same effect, Lord Dilhorne at p. 611.

<sup>9</sup> Lord Reid at p. 603; Lord Hodson at p. 606; Lord Dilhorne at p. 611; Lord Wilberforce at p. 615.

parties in the context of determining the proper law, reference cannot properly be made to their conduct subsequent to the formation of the contract. A choice of law clause whether express or implied is contractual, and a contract cannot be construed by reference to events taking place subsequent to its formation. The parties' submission to a particular curial law of later arbitration proceedings was, however, seemingly not contractual, and reference to their post-contract conduct might in that context be appropriate.

*The proper law of a contract: the effect of an arbitration clause*

Case No. 2. The House of Lords case of *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.*,<sup>1</sup> decided by their lordships after *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.*,<sup>2</sup> provides yet one more general illustration of the difficulties of determining the proper law of a contract. At the same time it highlights the more particular problem of the weight to be attached in this context to the inclusion in a contract of an arbitration clause.

The facts of the *Cie. Tunisienne* case were as follows. A Tunisian company had negotiated a contract with French shipowners through brokers in Paris for transport of a minimum of some 300,000 tons of crude oil from one Tunisian port to another. The printed tanker voyage charter was in standard English form and language and had some typed clauses added. Clause 13 of the printed form provided that: 'This contract shall be governed by the laws of the flag of the vessel carrying the goods. . . .' Clause 18 of the printed clauses provided that any disputes were to be settled by arbitrators in London. The added typed clauses included Clause 28 to the effect that 'Shipments [were] to be effected in tonnage owned, controlled or chartered' by the French shipowners 'of 16,000/25,000 tons at owner's option'. Disputes arose between the parties, and the Tunisian company claimed damages for repudiation of the contract. These disputes were referred to arbitrators in London, before whom a preliminary question as to the proper law of the contract was argued. The arbitrators made an interim award in the form of a special case in which they found *inter alia*, that the French shipowners had four or five vessels flying the French flag but none large enough to carry 25,000 tons; that three days before the making of the contract a Liberian vessel had been nominated for loading; that in the first four months the six ships chartered were respectively Norwegian, Swedish, Liberian, French, Liberian and Bulgarian; and that both parties contemplated at the time the contract was entered into that vessels owned by the French shipowners would be used 'at least primarily' to perform the contract.

The House of Lords, reversing the Court of Appeal and restoring Megaw J., unanimously held that the proper law of the contract was French law.

The basic right of the parties to a contract to choose the governing law was again<sup>3</sup> accepted by their lordships without question. As Lord Morris of Borth-y-Gest (who did not sit in the *Whitworth Street Estates* case) put it, 'It is first necessary to consider whether the parties themselves made an agreement as to which system of law should govern the contract. If they did, it is not suggested that any reason exists why their agreement should not determine the matter.'<sup>4</sup> The only reference to any limitation upon this freedom of choice was by Lord Diplock: 'the English courts will give effect

<sup>1</sup> [1970] 3 W.L.R. 389.

<sup>2</sup> [1970] A.C. 583. Noted above.

<sup>3</sup> As in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*, [1970] A.C. 583, noted above.

<sup>4</sup> [1970] 3 W.L.R. 389, 394.

to their choice unless it would be contrary to public policy to do so'.<sup>1</sup> The context of this acceptance by their lordships of the principle of (public policy apart) unfettered autonomy, it is to be noted, resembles that in which a similar approach was taken in the *Whitworth Street Estates* case. Here, as there, there had been no suggestion that the proper law should be any law other than that of a country (in this case France or England) with which, or with the legal system of which, the contract was connected.

Again, too, it was recognized as axiomatic that, where the parties have neither expressly nor by clear implication exercised their right to choose a governing law, resort must be had to a purely objective test.<sup>2</sup>

All the Law Lords, accepting the twin basic principles of the parties' freedom of choice, and resort to an objective test in default of choice, reached the conclusion that the proper law in the instant case was French law. What is a matter of remark is the divergence of view as to which of the two principles was rendered operative by the facts of the case. Three of their lordships (Lord Morris, Lord Dilhorne and Lord Diplock) took the view that clause 13 was sufficiently apt to indicate a choice by the parties of French law as the proper law.<sup>3</sup> Lord Reid and Lord Wilberforce, however, held that clause 13 was not apt to indicate a choice by the parties. This is a difference of opinion similar to that which is to be found in the judgments in the *Whitworth Street Estates*<sup>4</sup> case and commented upon above. The point, at which a search for the system of contract law to which the parties intended to submit, merges into an inquiry as to the country with which their agreement is factually most closely connected, will in many fact situations be incapable of precise or objective determination.

The particular importance of the *Cie. Tunisienne* decision is that it disposes of the notion that the contractual choice of a forum for arbitration amounts to a choice of the proper law of the contract. This fallacy had powerfully influenced the Court of Appeal in the instant case<sup>5</sup> and in its earlier decision of *Tzortzis v. Monark Line A/B*.<sup>6</sup> Dr. Cheshire accepts it: 'for better or for worse English law is committed to the view that *qui elegit judicem eligit jus*. An express choice of a tribunal is an implied choice of the proper law.'<sup>7</sup> In *Tzortzis v. Monark Line A/B*, the contract had its most real and substantial connection with Sweden, but an arbitration clause in the memorandum of agreement provided that any dispute arising out of the contract should be decided 'by arbitration in the city of London'. The Court of Appeal held that the effect of this choice of an English arbitral forum led to the conclusion that the proper law of the contract was English. This decision is not formally overruled by the *Cie. Tunisienne* case, but its reasoning is decisively rejected. Lord Morris said, 'there is no inflexible or conclusive rule to the effect that an agreement to refer disputes to arbitration in a particular country carries with it the additional agreement or necessarily indicates a clear intention that the law governing the matters in dispute is to be the law of that country'.<sup>8</sup> Lord Reid put the point no less clearly but more strongly: 'it would, in

<sup>1</sup> Ibid., p. 411.

<sup>2</sup> Although Lord Wilberforce (ibid., 404) would seemingly prefer to have the test couched in terms of 'inferred intention'. See his preference for the formulation used in the 7th ed. (1958), p. 731, of Dicey's *Conflict of Laws* to that set out in the current 8th ed. (1967), p. 691.

<sup>3</sup> Lord Dilhorne relied upon clause 13 read together with clause 28.

<sup>4</sup> [1970] A.C. 583.

<sup>5</sup> [1969] 1 W.L.R. 1338.

<sup>6</sup> [1968] 1 W.L.R. 406. See this *Year Book*, 43 (1968-9), pp. 251-2.

<sup>7</sup> Cheshire, *Private International Law* (8th ed., 1970), pp. 205-6. Dicey and Morris, *Conflict of Laws* (8th ed., 1967), p. 705, is, however, more guarded.

<sup>8</sup> [1970] 3 W.L.R. 389, 397.



my view, be highly anomalous if our law required the mere fact that arbitration is to take place in England to be decisive as to the proper law of the contract.'<sup>1</sup>

It was, of course, accepted by all their lordships that, although the choice of an arbitral forum is not determinant of the proper law, it will, nevertheless, in many cases be an important factor to be taken into account, either as indicative of the parties' intentions or in assessing objectively the centre of gravity of their contract.

A question must now arise as to the weight which is to be attached to this factor. It is clearly the sort of question to which a precise answer cannot sensibly be attempted. Contracts and contractual fact situations are infinitely various, and the former must be construed, as the latter must be assessed, in the light of all the relevant circumstances of a particular case. One guide line may, however, be set out. As a matter of common sense it would seem that the choice of an arbitral forum will generally carry more weight as an indication of the legal system to which the parties intended to submit, than it will as a fact 'connecting' a contractual situation objectively with a particular country. So long as the inquiry is as to the parties' intention, the fact that they have chosen a particular country as a forum for possible arbitration may often be adjudged to have considerable significance. If, however, in the light of all the evidence no realistic determination of the parties' intention is possible, and resort is accordingly had to geographic location of the fact situation, it may well be that the mere circumstance of choice of a particular arbitral forum should carry relatively little weight—certainly as compared with, for example, the weight which will normally then attach to the place of performance.

### *Foreign torts*

*Case No. 3.* For nearly a hundred years the rule in *Phillips v. Eyre*<sup>2</sup> has formed the cornerstone of the English private international law of tort: 'As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; . . . Secondly, the act must not have been justifiable by the law of the place where it was done.'<sup>3</sup> Willes J.'s words, although put forward by the great Victorian judge as constituting no more than 'a general rule', have been accorded a degree of respect normally reserved for statutory enactments. The twofold requirement of reference to the *lex fori* and to the *lex loci delicti commissi* became an inflexible orthodoxy in the English courts. Seeds of heresy were, however, sown in an article<sup>4</sup> written by an Englishman and published in the *Harvard Law Review* in 1951; and in several subsequent American cases these seeds took root. The best known is probably the decision of the New York Court of Appeals in *Babcock v. Jackson*.<sup>5</sup> There a New York forum, in a case arising out of a motor accident which had taken place in Ontario, held the defendant liable notwithstanding the fact that, having regard to the driver-gratuitous passenger relationship which existed between himself and the deceased, he was protected from liability by an Ontario statute. In England, however, it has not been until the recent House of Lords case of *Boys v. Chaplin*<sup>6</sup> that there has been a judicial reappraisal of the foundations

<sup>1</sup> [1970] 3 W.L.R. 394. See, too, Lord Dilhorne at p. 402, Lord Wilberforce at p. 408 and Lord Diplock at p. 413 and p. 416.

<sup>2</sup> (1870) L.R. 6 Q.B. 1.

<sup>3</sup> *Ibid.*, p. 28.

<sup>4</sup> Morris, *Harvard Law Review*, 64 (1951), p. 881.

<sup>5</sup> 12 N.Y. 2d. 473; 191 N.E. 2d. 279; 240 N.Y.S. 2d. 743 (1963); reported in England, [1963] 2 Ll.R. 286. See, too, e.g. the Californian case of *Reich v. Purcell*, 432 P. 2d. 727 (1967).

<sup>6</sup> [1969] 3 W.L.R. 322.

and role of the *Phillips v. Eyre* doctrine. Unfortunately the outcome of this reappraisal is obscure.

The facts which gave rise to *Boys v. Chaplin* are simple. The respondent had sustained serious injuries in a road accident in Malta caused by the admitted negligence of the appellant. Both parties were normally resident in England and were at the time of the accident serving in H.M. Armed Forces\*stationed in Malta. The respondent brought an action in England, and the only issue was as to whether damages were to be assessed according to the law of Malta, where he could have sued the appellant but would have recovered only special damages agreed to be £53 and in addition certain (as distinct from problematical) future financial loss, or according to the law of England, under which he could in addition recover general damages for pain, suffering, loss of amenities and problematical future financial loss. The trial judge, applying English law, awarded the respondent general damages of £2,250 and the £53 special damages. The Court of Appeal, Diplock L.J. dissenting, affirmed the decision. This affirmation was itself affirmed by the House of Lords. The decision of their lordships' House was unanimous, but each of the five Lords of Appeal reached the same result by a different and sometimes tortuous route.

It is respectfully submitted that least attractive is the reasoning of Lord Guest and that of Lord Donovan. Each held English law applicable *qua lex fori*. Lord Guest took the view that the question for determination pertained to the quantification of damages and was, as such, one of procedure. Lord Donovan held that the issue was not as to the rights of the parties but as to the nature of the available remedy, and his lordship prayed in aid the doctrine that the forum must apply its own remedies.

Lord Guest said, 'There would appear to be a distinction between questions affecting heads of damages which are for the *lex loci delicti* and quantification of damages which is for the *lex fori*.'<sup>1</sup> He found that in the instant case the issue fell within the latter category. It is submitted with respect that the characterization of the issue in *Boys v. Chaplin* as procedural ill accords with the policy underlying the rule that matters of procedure are to be governed by the *lex fori*. That policy is that, however foreign the complexion of a particular fact situation may be, there are certain matters which overriding considerations of convenience require should always be regulated by the local law of the forum. Obvious examples are the admissibility of evidence, the relative roles of judge and jury and the general conduct of the trial: so, too, no doubt certain technical questions concerned with the quantification of damages. But similar considerations do not apply to questions relating to the extent of the damage in respect of which compensation is to be available. The convenience of the forum is in no significant way prejudiced by not allowing recovery in respect of pain, suffering, loss of amenities, etc. In *D'Almeida Arango (f), Lda. v. Sir Frederick Becker & Co. Ltd.*,<sup>2</sup> an action for breach of contract, the proper law of which was Portuguese, the court found no difficulty in withholding recovery in respect of damage which, although not too remote by English domestic law, was too remote by Portuguese law.

In *Boys v. Chaplin* Lord Donovan relied upon the principle that remedies are a matter for the *lex fori*. It is undoubtedly true that an English court cannot make available a remedy of a type unknown to English domestic law. This, again, is based on considerations of convenience. Damages are, however, a traditional common law remedy, and the award of a lesser rather than a greater amount (or *vice versa*), being in no way inconvenient, is scarcely within the policy of the rule.

The rule that matters of procedure are governed exclusively by the domestic law

<sup>1</sup> *Ibid.*, p. 334.

<sup>2</sup> [1953] 2 Q.B. 329.



of the forum, and the rule that a forum can make available only its own domestic remedies, both tend (the former directly and the latter indirectly) to maximize the significance of the fact that an action has been brought in a particular country. They are in this sense inimical to one of the main purposes of private international law. The existence of each rule is required by considerations of practical convenience, but each should be narrowly construed and not allowed to reach beyond what practical convenience actually requires.

Lord Pearson also applied English law *qua lex fori*, but he held it so applicable as the *lex causae*, i.e. as the law governing the substantive issue. He took the view that the rule for choice of law in tort actions is epitomized in the words of Willes J. in *Phillips v. Eyre*,<sup>1</sup> and that the primary emphasis is upon the *lex fori*. His lordship said, 'Willes J.'s statement of the conditions which have to be fulfilled (which may be called "the Willes formula") shows that in such a case the substantive law of England plays the dominant role, determining the cause of action, whereas the law of the place in which the act was committed plays a subordinate role, in that it may provide a justification for the act and so defeat the cause of action but it does not in itself determine the cause of action.'<sup>2</sup> In the instant case Maltese law provided no justification for the defendant's acts; English law was, therefore, exclusively applicable. Lord Pearson's reasoning involves approval of, and, indeed, emphasis upon, the much criticized rule in *The Halley*<sup>3</sup> which forms the basis of the first arm of the 'Willes formula'. At the same time his lordship said of the perhaps even more heavily criticized decision of the Court of Appeal in *Machado v. Fontes*,<sup>4</sup> 'In my opinion, this decision involved a correct interpretation of the Willes formula.'<sup>5</sup> His lordship concluded, 'The English rule, giving a predominant role to the *lex fori* in accordance with the Willes formula as interpreted in *Machado v. Fontes* is well established. It has advantages of certainty and ease of application. It enables the English courts to give judgment according to their own ideas of justice. I see no sufficient reason for discarding or modifying this established rule for the normal case in which the action is appropriately brought in the English courts.'<sup>6</sup> Lord Pearson was, however, conscious of the dangers of 'forum shopping', to which the application of the *lex fori* may give rise, and did admit that in a situation in which the plaintiff 'would naturally and appropriately be suing the defendant in the courts of some other country . . . it may be desirable as a matter of public policy for the English courts, for the purpose of discouraging "forum shopping" to apply the law of the natural forum'.

It is of course true that such a qualification might mitigate some of the undesirable results to which the application of the domestic law of the forum, under whatever guise, could lead. As has already been pointed out, one of the main purposes of the conflict of laws is to achieve uniformity of result whatever the forum chosen. In any case where the *lex fori* is applied the achievement of this purpose is put in jeopardy: in *Boys v. Chaplin* itself the plaintiff could 'naturally and appropriately' have sued in Malta, and the result would have been different. A purpose is not best achieved by resort to an ill-defined public policy gloss upon a choice of law rule which is intrinsically antipathetic to that purpose.

Lord Hodson and Lord Wilberforce both accepted the basic principle that the *lex loci delicti* plays a major role in cases concerned with foreign torts. Each approved

<sup>1</sup> (1870) L.R. 6 Q.B. 1.

<sup>3</sup> (1868) L.R. 2 P.C. 193.

<sup>6</sup> *Ibid.*, p. 356.

<sup>2</sup> Per Lord Pearson, [1969] 3 W.L.R. 322, 349-50.

<sup>4</sup> [1897] 2 Q.B. 231.

<sup>5</sup> [1969] 3 W.L.R. 322, 351.



the rule in *Phillips v. Eyre* as traditionally stated<sup>1</sup> but each held that it should not be inflexibly applied to all issues in all cases. Lord Hodson referred to the fact that Willes J. had himself prefaced his formulation with the words 'As a general rule'. Both Lord Hodson and Lord Wilberforce held this general rule not applicable in the instant case. Dealing with the issue for decision the former said, 'If controlling effect is given to the law of the jurisdiction which because of its relationship with the occurrence and the parties has the greater concern with the specific issue raised in the litigation, the ends of justice are likely to be achieved. . . .'<sup>2</sup> Lord Wilberforce said, 'The issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case, negligence or otherwise, related to the parties involved and their circumstances, and tested in relation to the policy of the local rule and of its application to the parties so circumstanced.'<sup>3</sup> Certainly Lord Wilberforce, and probably Lord Hodson, would not have departed from the general principle had the issue been as to whether the defendant was liable at all. A particular departure from the general rule was justified by the particular facts of the case (both parties were British subjects domiciled and usually resident in England) in determining a particular issue (the applicability of a Maltese rule limiting damages which the Maltese State had no interest in applying to persons resident outside it).

So the rule in *Phillips v. Eyre* survives as the basis at least of the English private international law of tort. This much is clear.

Moreover, in one specific respect its scope has been clarified and improved: although *Machado v. Fontes*<sup>4</sup> is not expressly overruled, it seems that the excessively literal interpretation placed upon the second arm of the rule in that case has been rejected. The Court of Appeal had, indeed, taken the view that *Machado v. Fontes* should be overruled. In the House of Lords Lord Hodson<sup>5</sup> and Lord Wilberforce<sup>6</sup> were of the same opinion. Lord Donovan said somewhat cryptically that it,<sup>7</sup> 'while within the rule [in *Phillips v. Eyre*], was an abuse of it'. Lord Pearson on the other hand saw it as involving 'a correct interpretation of the Willes formula',<sup>8</sup> but later referred to the possibility of a public policy qualification preventing 'a repetition of what may have happened in *Machado v. Fontes*'.<sup>9</sup>

On the other hand, another focal point of criticisms that have been levelled against the *Phillips v. Eyre* rule, namely the general requirement of actionability by English law, has come through unscathed. The particular facts of *Boys v. Chaplin*, provoking as they did a quest for plausible reasons for the application of English law on the issue of damages, did not provide an auspicious opportunity for any reassessment of this requirement, of which Hancock, the author of a leading monograph on torts in the conflict of laws, has written, 'One would look far to find a more striking example of mechanical jurisprudence, blind adherence to a verbal formula without regard to policies or consequences.'<sup>10</sup>

The retention of the *Phillips v. Eyre* doctrine necessarily involved rejection of the idea that reference to the law of the place of commission should be replaced by reference to an objectively determined 'proper law' of a tort. Its rejection by Lord Guest<sup>11</sup> and Lord Donovan<sup>12</sup> was express and emphatic. Lord Pearson<sup>13</sup> disclaimed the notion by

<sup>1</sup> Lord Wilberforce would seemingly treat the first part of the rule requiring actionability by English law with greater respect than would Lord Hodson.

<sup>2</sup> [1969] 3 W.L.R. 322, 332.

<sup>3</sup> Ibid., p. 344.

<sup>4</sup> [1897] 2 Q.B. 231.

<sup>5</sup> [1969] 3 W.L.R. 322, 330.

<sup>6</sup> Ibid., p. 340.

<sup>7</sup> Ibid., p. 336.

<sup>8</sup> Ibid., p. 351.

<sup>9</sup> Ibid., p. 357.

<sup>10</sup> Hancock, *Torts in the Conflict of Laws*, p. 89.

<sup>11</sup> [1969] 3 W.L.R. pp. 333-4.

<sup>12</sup> Ibid., p. 336.

<sup>13</sup> Ibid., p. 356.

clear implication; and its applicability, otherwise than perhaps by way of exception, was rejected by Lord Wilberforce.<sup>1</sup>

The major uncertainty introduced into the private international law of tort by the decision in *Boys v. Chaplin* is as to the nature and extent of permitted departure from the *Phillips v. Eyre* rule. What if a Maltese had suffered similar injuries in the same accident as a result of the same defendant's negligence, and both he and the plaintiff had brought their actions in England? Would an English court have awarded very different damages on the basis of the nationality, domicil and residence of the plaintiffs? Or suppose the plaintiff suing in an English court had been found to be domiciled in Scotland. Presumably Lord Guest and Lord Donovan and possibly Lord Pearson would still have applied English law. What Lord Hodson and Lord Wilberforce would have done on this hypothesis is, however, not clear. Again, consider the converse of the fact situation in *Boys v. Chaplin*: suppose one Maltese injures another Maltese in a London road accident. Would an English court limit damages to the amount which would be available in Maltese proceedings?<sup>2</sup> It is a consideration of problems such as these that provokes the thought that the approach of the solitary dissentient Diplock L.J. in the Court of Appeal<sup>3</sup> is the least objectionable. He would have limited damages on the facts of *Boys v. Chaplin* to those available under Maltese law.

The application of the *lex loci delicti commissi* to questions of remoteness of damage would not, of course, imply its automatic application to all issues which may arise in a tort action. There are many such issues—for example, as to whether spouses can sue one another, as to whether a master is vicariously liable for the acts of his servant, and as to whether a motor-car driver is liable to a gratuitous passenger<sup>4</sup>—where rigid adherence to the rule in *Phillips v. Eyre* would, for one reason or another, be inept. The aura of flexibility, in which choice of law in tort has now been shrouded by the House of Lords, caters for divergence from the rule on appropriate issues.

There is, however, room for the view that the question in *Boys v. Chaplin*, namely as to remoteness of damage, was not one such issue. It could be contended that questions of liability and questions of the extent of liability are not sensibly severable for choice of law purposes. The law which determines liability ought in logic and in policy to determine what is meant by liability.

P. B. CARTER

<sup>1</sup> Hancock, *Torts in the Conflict of Laws*, p. 343.

<sup>2</sup> The New York Court of Appeals in *Kell v. Henderson* 270 N.Y.S. 2d. 552 (perhaps significantly) refused to follow the philosophy of *Babcock v. Jackson*, [1963] 2 Ll.R. 286 on almost precisely converse facts.

<sup>3</sup> [1968] 2 Q.B. 1.

<sup>4</sup> This was the issue in *Babcock v. Jackson*. It is significant that in that case it was expressly indicated that, had the issue been as to the defendant's negligence, the law of Ontario where the accident occurred would have been applied.

# DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1969-1970\*

*Restrictive practices—cumulative application of Community law and national law—double jeopardy—discrimination on grounds of nationality*

*Case No. 1. Wilhelm and others v. Bundeskartellamt.*<sup>1</sup> The appellants in this case were German chemical companies, and directors and executives of German chemical companies. On 28 November 1967 the Berlin Bundeskartellamt had imposed fines on them, on the grounds that they had violated the German law on restrictive practices by entering into an agreement with other chemical manufacturers in other member States, and in non-member States, to increase the price of aniline by 8 per cent as from 16 October 1967. The appellants appealed against this decision to the Berlin Kammergericht (Kartellsenat).

Meanwhile, on 31 May 1967, the Commission of the European Communities began an investigation of the alleged price ring in aniline. At first the investigation was limited to price increases which had occurred in 1964 and 1965, but in October 1967 the investigation was extended to include the price increase which had occurred during that month.<sup>2</sup>

One of the grounds of the appellants' appeal to the Kammergericht was that national authorities were precluded, under the E.E.C. Treaty, from applying their national law on restrictive practices to the appellants' activities, since the Commission of the European Communities was already investigating whether those activities were contrary to Community law. In accordance with Article 177 of the E.E.C. Treaty, the Kammergericht asked the Court of Justice of the European Communities to answer four questions concerning this argument of the appellants.

Written or oral statements were made to the Court of Justice of the European Communities, not only by the appellants, but also by the French, German and Netherlands Governments and by the Commission of the European Communities.

The Court dealt with the Kammergericht's first and third questions together. The Kammergericht's first question asked whether it was compatible with Article 85<sup>3</sup> of

\* © Dr. Michael Akehurst, 1970.

<sup>1</sup> *Recueil de la jurisprudence*, 15 (1969), p. 1.

<sup>2</sup> The Commission's investigations were not completed until July 1969 (i.e. after the Court's decision, which was handed down on 13 February 1969). In July 1969 the Commission decided that the increases in the price of aniline (and other dyestuffs) were contrary to Article 85 of the E.E.C. Treaty (for the text of Article 85, see below, n. 3), and imposed fines on the German companies involved, as well as on several other companies, including Imperial Chemical Industries, Ltd. Appeals by I.C.I. and seven of the other eight companies involved are now pending before the Court of Justice of the European Communities. See *International Legal Materials*, 6 (1969), p. 1330.

<sup>3</sup> Article 85 provides:

1. Sont incompatibles avec le marché commun et interdits tous accords entre entreprises, toutes décisions d'associations d'entreprises, et toutes pratiques concertées, qui sont susceptibles d'affecter le commerce entre les États membres et qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun . . .

2. Les accords ou décisions interdits en vertu du présent article sont nuls de plein droit.



the E.E.C. Treaty, with Article 9 of Regulation 17,<sup>1</sup> and with the general principles of Community law, to apply national law on restrictive practices to activities which were already being investigated by the Commission of the European Communities under Article 85. The third question asked whether the application of national law in such circumstances was compatible with Articles 5 and 3(f) of the E.E.C. Treaty<sup>2</sup> and with Article 9 of Regulation 17. (The appellants argued that the application of national law in such circumstances was liable to have a distorting effect on competition, because the decisions taken by the authorities of one member State might differ from the decisions taken by the Commission of the European Communities and by the authorities of other member States.)

The Court began by pointing out that the reference made by Article 9 of Regulation 17 to the powers of national authorities was only concerned with their power to apply Article 85 of the Treaty; it was irrelevant as regards their power to apply national law.

The Court then went on to hold that Community law and national law on restrictive practices, despite basic differences, overlapped, so that there might be circumstances in which it was entirely legitimate for both systems of law to be applied simultaneously:

*attendu que le droit communautaire et le droit national en matière d'ententes considèrent celles-ci sous des aspects différents;*

*qu'en effet, alors que l'article 85 les envisage en raison des entraves qui peuvent en résulter pour le commerce entre les États membres, les législations internes, inspirées par des considérations propres à chacune d'elles, considèrent les ententes dans ce seul cadre;*

*attendu, il est vrai, qu'en raison de l'interdépendance éventuelle des phénomènes économiques et des situations juridiques considérés, la distinction des aspects com-*

3. Toutefois, les dispositions du paragraphe 1 peuvent être déclarées inapplicables:

à tout accord ou catégoric d'accords cntre entreprises,

à toute décision ou catégorie de décisions d'associations d'entreprises, et

à toute pratique concertée ou catégorie de pratiques concertées,

qui contribuent à améliorer la production ou la distribution des produits ou à promouvoir le progrès technique ou économique, tout en réservant aux utilisateurs une partie équitable du profit qui en résulte, et sans:

(a) imposer aux entreprises intéressées des restrictions qui ne sont pas indispensables pour atteindre ces objectifs,

(b) donner à ces entreprises la possibilité, pour une partie substantielle des produits en cause, d'éliminer la concurrence.

<sup>1</sup> Regulation 17 was enacted by the E.E.C. Council of Ministers to implement Article 85 of the Treaty. Article 9 of Regulation 17 provides:

1. Sous réserve du contrôle de la décision par la Cour de justice, la Commission a compétence exclusive pour déclarer les dispositions de l'article 85, paragraphe 1, inapplicables conformément à l'article 85, paragraphe 3, du traité.

2. . . .

3. Aussi longtemps que la Commission n'a engagé aucune procédure en application des articles 2, 3 ou 6, les autorités des États membres restent compétentes pour appliquer les dispositions de l'article 85, paragraph 1 . . .

<sup>2</sup> Article 5 provides:

Les États membres prennent toutes mesures générales ou particulières propres à assurer l'exécution des obligations découlant du présent traité ou résultant des actes des institutions de la Communauté. Ils facilitent à celles-ci l'accomplissement de sa mission.

Ils s'abstiennent de toutes mesures susceptibles de mettre en péril la réalisation des buts du présent traité.

Article 3 provides:

. . . l'action de la Communauté comporte, dans les conditions et selon les rythmes prévus par le présent traité: . . . (f) l'établissement d'un régime assurant que la concurrence n'est pas faussée dans le marché commun.

munautaires et nationaux ne saurait servir, dans tous les cas, de critère déterminant à la délimitation des compétences;<sup>1</sup>

que, cependant, elle implique qu'une même entente puisse, en principe, faire l'objet de deux procédures parallèles, l'une devant les autorités communautaires en application de l'article 85 du traité C.E.E., l'autre devant les autorités nationales en application du droit interne.<sup>2</sup>

This conclusion was confirmed, according to the Court, by Article 87 (2) (e) of the E.E.C. Treaty, which authorized the Council of Ministers to enact regulations or directives in order to *définir les rapports* between national law and the provisions enacted by the Council of Ministers concerning the implementation of Article 85. The obvious corollary, in the Court's opinion, was that, in the absence of enactments under Article 87 (2) (e), 'les autorités nationales en matière d'ententes peuvent procéder également à l'égard de situations susceptibles de faire l'objet d'une décision de la Commission'.<sup>3</sup>

However, after admitting in principle the legality of overlapping applications of national law and Community law, the Court proceeded to lay down a far-reaching condition—the application of national law must not prejudice the uniform application, throughout the Common Market, of the Community rules on restrictive practices.

attendu toutefois que, en vertu du respect de la finalité générale du traité, cette application parallèle du système national ne saurait être admise que pour autant qu'elle ne porte pas préjudice à l'application uniforme, dans tout le marché commun, des règles communautaires en matière d'ententes et du plein effet des actes pris en application de ces règles;

qu'une autre solution serait incompatible avec les objectifs du traité et le caractère de ses règles en matière de concurrence;

...<sup>4</sup>

que l'article 87, paragraphe 2 (e), en attribuant à une institution de la Communauté le pouvoir de définir les rapports entre les législations nationales et le droit communautaire de la concurrence, confirme le caractère prééminent du droit communautaire;

que le traité C.E.E. a institué un ordre juridique propre, intégré au système juridique des États membres et qui s'impose à leurs juridictions;

qu'il serait contraire à la nature d'un tel système d'admettre que les États membres puissent prendre ou maintenir en vigueur des mesures susceptibles de compromettre l'effet utile du traité;

que la force impérative du traité et des actes pris pour son application ne saurait varier d'un État à l'autre par l'effet d'actes internes, sans que soit entravé le fonctionnement du système communautaire et mis en péril la réalisation des buts du traité;

que, dès lors, les conflits entre la règle communautaire et les règles nationales en matière d'entente doivent être résolus par l'application du principe de la primauté de la règle communautaire;

<sup>1</sup> The Commission of the European Communities pointed out that a restrictive practice cannot affect trade *between* member States without simultaneously affecting trade *within* at least one member State (*Recueil*, 15 (1969), p. 6). The Advocate-General Roemer also stated that any attempt to prevent the application of national law to situations covered by Community law would mean that the boundary between national law and Community law would depend on 'un critère très incertain, flou et susceptible de se modifier: le préjudice porté au commerce interétatique' (*ibid.*, p. 23).

<sup>2</sup> '... rien dans les dispositions citées par le Kammergericht n'indique que le droit national doit être écarté lorsque les conditions requises par l'article 85 sont réunies...' (*per* the Advocate-General Roemer, *ibid.*, p. 21; italics in the original).

<sup>3</sup> Needless to say, the appellants had drawn a different inference from Article 87 (2) (e); see *ibid.*, pp. 6, 22-3.

<sup>4</sup> Two paragraphs are omitted here. See below, p. 231.

qu'il résulte de tout ce qui précède que, dans le cas où des décisions nationales à l'égard d'une entente s'avéreraient incompatibles avec une décision adoptée par la Commission à l'issue de la procédure engagée par elle, les autorités nationales sont tenues d'en respecter les effets;

attendu que, dans les cas où, au cours d'une procédure nationale, il apparaît possible que la décision par laquelle la Commission mettra fin à une procédure en cours concernant le même accord pourrait s'opposer aux effets de la décision des autorités nationales, il appartient à celles-ci de prendre les mesures appropriées.<sup>1</sup>

For these reasons the Court gave the following reply to the first and third questions raised by the Kammergericht:

Tant qu'un règlement adopté en vertu de l'article 87, paragraphe 2 (e), du traité n'en a pas disposé autrement, les autorités nationales peuvent intervenir contre une entente, en application de leur loi interne, même lorsque l'examen de la position de cette entente à l'égard des règles communautaires est pendante devant la Commission, sous réserve cependant que cette mise en œuvre du droit national ne puisse porter préjudice à l'application pleine et uniforme du droit communautaire et à l'effet des actes d'exécution de celui-ci.

The Court's views about the supremacy of Community law, and about the necessity of not prejudicing the uniform application of the Community rules on restrictive practices, are unexceptionable; but it is by no means easy to say how such principles should be applied to the various types of problems which could arise in practice.

Basically, a conflict between national law and Community law can arise in one of two ways. Either the Community rules against restrictive practices are stricter than the national rules; or else the national rules are stricter than the Community rules.

The first hypothesis presents relatively few problems. If a certain restrictive practice is contrary to Community law but not contrary to national law, it is submitted that there is no need to amend national law, so as to make the practice *doubly* illegal; it is sufficient for national law to give effect, where necessary, to the consequences of illegality under Community law. (This is what is meant by saying that Community law overrides national law.) For instance, if a contract is rendered void by Article 85 (2) of the E.E.C. Treaty, national courts must treat the contract as void in all litigation concerning that contract.

More serious problems arise in the second class of cases, i.e. where national law is stricter than Community law. There are three different types of situation which must be considered.

In the first place, a national law might be drafted in wider terms than Article 85 (1) of the E.E.C. Treaty, so that acts which were not contrary to Community law would be contrary to national law. Presumably such a law would not fall foul of the principles laid down by the Court in the *Wilhelm* case; the national law and Article 85 (1) of the Treaty would both be pursuing the same goal—preventing restrictions on competition. But this problem is an unreal one, because Article 85 (1) is drafted in the widest possible terms, and it is difficult to imagine how a national law could be drafted in wider terms. (Of course, a national law would probably be drafted in wider terms in the sense that it would probably not be limited to acts which were capable of affecting trade between member States; but the E.E.C. Treaty does not apply at all to acts which are not capable of affecting trade between member States, and, where the

<sup>1</sup> Thus, presumably, the national authorities might postpone taking a decision, or might reserve the power to alter their decision in the light of the subsequent decision taken by the Commission.



Treaty does not apply, there cannot, by definition, be a conflict between national law and the Treaty.)

Secondly, an act might be contrary to both Community law and national law, but national law might impose heavier penalties; for instance, it might impose a heavy fine in cases where the Commission of the European Communities confined itself to merely issuing a warning. The Commission argued before the Court that such a state of affairs was incompatible with the uniform application of the rules of the Treaty.<sup>1</sup> With respect, this argument seems somewhat excessive; so long as the same substantive rules are applied in all the member States, does it really matter that the punishments for infringing the rules vary from State to State? Besides, as the German Government pointed out,<sup>2</sup> a restrictive practice which had slight effects on inter-State trade might have disastrous effects on trade within a State; and in such circumstances it is only reasonable that national authorities should impose heavier penalties than the Commission of the European Communities.

Thirdly, a restrictive practice might be authorized under Article 85 (3) of the E.E.C. Treaty, but might be illegal according to national law. It could be argued that such a national law is in keeping with the spirit of Article 85, because it is designed to secure the same objective—preventing restrictions on competition. But the prevention of restrictions on competition is not an end in itself; it is a means towards achieving the ultimate objectives of the Community, which are stated in Article 2 of the Treaty:

... un développement harmonieux des activités économiques dans l'ensemble de la Communauté, une expansion continue et équilibrée, une stabilité accrue, un relèvement accéléré du niveau de vie, et des relations plus étroites entre les États qu'elle [i.e. la Communauté] réunit.

The underlying philosophy of Article 85 (3) is that restrictions on competition may sometimes be more effective than total competition in achieving these objectives. When a restrictive practice is authorized under Article 85 (3), the authorization is granted in the interests of the whole Community. It is hardly compatible with the Treaty that a member State should be allowed to enforce laws which would prevent enterprises from acting in accordance with such authorizations. Moreover, since national laws vary from country to country, such a state of affairs would be incompatible with the uniform application of Community law. The Court of Justice of the European Communities seems to have accepted this view,<sup>3</sup> for, near the beginning of the section of the judgment which deals with the supremacy of Community law and the need for its uniform application,<sup>4</sup> the two following paragraphs appear:

que l'article 85 du traité C.E.E. s'adresse à toutes les entreprises de la Communauté dont il règle le comportement, soit par la voie d'interdictions, soit en vertu de l'octroi d'exemptions accordées—sous les conditions qu'il précise—en faveur des ententes qui contribuent à améliorer la production ou la distribution des produits, ou à promouvoir le progrès technique ou économique;

que si le traité vise, en premier lieu, à éliminer par ces moyens les entraves à la libre circulation des marchandises dans le marché commun et à affirmer et sauvegarder l'unité de ce marché, il permet aussi aux autorités communautaires d'exercer une certaine action positive, quoique indirecte, en vue de promouvoir un développement harmonieux des activités économiques dans l'ensemble de la Communauté, conformément à l'article 2 du traité.

<sup>1</sup> *Recueil de la jurisprudence*, 15 (1969), at pp. 11 and 27-9.

<sup>2</sup> *Ibid.*, p. 8.

<sup>3</sup> Unlike the Advocate-General Roemer; *ibid.*, pp. 24-5. Herr Roemer also pointed out that this problem was not strictly relevant to the questions raised by the Kammergericht, because the appellants had never tried to argue that their activities were justified by Article 85 (3).

<sup>4</sup> See above, p. 229 n. 4.

Appearing where they do in the judgment, these paragraphs, with their emphasis on Articles 2 and 85 (3), are highly significant.

But it must be confessed that the deduction of practical rules from the general principles laid down by the Court is likely to remain somewhat speculative in the absence of further cases on the subject. Indeed, one may be forgiven for thinking that the Court's replies to the first and third questions asked by the Kammergericht raise more problems than they solve. Fortunately, however, when we come to examine the Court's replies to the second and fourth questions, we find ourselves on firmer ground.

The Kammergericht's second question raised the problem of double jeopardy. If national authorities took action against a restrictive practice under national law, and if Community authorities took similar action under Community law, the participants in the restrictive practice might be punished twice for the same act. Should this possibility debar the national authorities from taking action?

The appellants argued that the Court should answer this question in the affirmative, relying on the principle *non bis in idem*.<sup>1</sup> The Advocate-General Roemer, however, thought otherwise:

... le principe *non bis in idem* est applicable dans le cadre de l'ordre juridique interne des États membres, mais ... il n'est pas valable lorsqu'il s'agit des rapports entre le droit national et le droit communautaire. Sur ce point, la jurisprudence a déjà constaté ... qu'il s'agit de deux ordres juridiques distincts, indépendants. Or, tant que les Communautés ne constitueront pas un ordre juridique fédéral, il paraît plus logique de faire un rapprochement entre les actes des institutions de la Communauté et les actes de souveraineté étrangers et d'appliquer pour l'exercice du pouvoir de sanction les règles en vigueur dans les rapports entre ordres juridiques différents. Il en résulte donc que le simple fait que la Commission ait engagé une procédure ne saurait contraindre à lui seul les autorités nationales à renoncer à leur pouvoir de sanction.<sup>2</sup>

The most that the Advocate-General was prepared to concede was that the institution of proceedings by Community authorities against a restrictive practice debarred national authorities from applying *Community law* against that restrictive practice; but national authorities remained free to apply national law.

The appellants also relied on the principle of French and Dutch law which allows a foreign conviction to be pleaded as a bar to a subsequent prosecution in French or Dutch courts. The Advocate-General pointed out that this principle was not accepted in the other four member States; moreover, he thought that such a principle of criminal law was probably not applicable in any event to administrative proceedings. He suggested that the most just and practical solution was for the sanctions imposed by one set of authorities (Community or national, whichever happened to be the first to impose sanctions) to be 'taken into account' by the second set of authorities when the second set of authorities subsequently came to impose sanctions of their own.<sup>3</sup>

<sup>1</sup> One might imagine that this principle would also operate to prevent the Community authorities from acting in a case where the national authorities had begun proceedings first. But the appellants argued that such a result would be contrary to the principle of the supremacy of the Community law. What the appellants were really suggesting was that the combination of the principle *non bis in idem* with the principle of the supremacy of Community law gave the Community authorities exclusive jurisdiction, or at least 'primary jurisdiction' (if one may borrow that term from the N.A.T.O. Status of Forces Agreement), over all cases where there was an overlap between Community law and national law on restrictive practices.

<sup>2</sup> *Recueil de la jurisprudence*, 15 (1969), p. 26 (italics in the original).

<sup>3</sup> *Ibid.*, at pp. 26-7.

The Court reached the same conclusion, although its reasoning was shorter and less interesting:

attendu que la possibilité d'un cumul de sanctions ne serait pas de nature à exclure l'admissibilité de deux procédures parallèles, poursuivant des fins distinctes;

que, sans préjudice des conditions et limites indiquées en réponse à la première question, l'admissibilité de cette double procédure résulte en effet du système particulier de répartition des compétences entre la Communauté et les États membres dans la matière des ententes;

que si, cependant, la possibilité d'une double procédure devait conduire à un cumul de sanctions, une exigence générale d'équité, telle qu'elle a trouvé par ailleurs son expression dans la fin de l'alinéa 2 de l'article 90 du traité C.E.C.A., implique qu'il soit tenu compte de toute décision répressive antérieure pour la détermination d'une éventuelle sanction.<sup>1</sup>

The Kammergericht's fourth question concerned discrimination on grounds of nationality. The appellants were particularly aggrieved that they were subject both to national proceedings and to Community proceedings, whereas only the Community authorities (and not the German authorities) had taken action against the foreign companies involved in the alleged price ring. The Court paraphrased and answered the Kammergericht's question in the following words:

Attendu que le juge national demande enfin si, en présence d'une procédure engagée par la Commission contre une entente, il serait compatible avec l'article 7 du traité C.E.E. que l'autorité nationale adopte des mesures répressives à l'égard de cette même entente;<sup>2</sup>

que cette question vise en particulier le cas où les autorités d'un État compétentes en matière d'ententes estiment leurs mesures exclusivement aux ressortissants de cet État et, par là, peuvent mettre ces derniers dans une position désavantageuse par rapport aux ressortissants d'autres États membres qui se trouvent dans une situation comparable;

attendu que l'article 7 du traité C.E.E. interdit à chaque État membre d'appliquer différemment son droit des ententes en raison de la nationalité des intéressés;

que, cependant, l'article 7 ne vise pas les éventuelles disparités de traitement et les distorsions qui peuvent résulter, pour les personnes et entreprises soumises à la juridiction de la Communauté, des divergences existant entre les législations des différents États membres, dès lors que celles-ci affectent toutes personnes tombant sous leur application, selon des critères objectifs et sans égard à leur nationalité.

Three general observations may be made about this final section of the Court's judgment.

In the first place, it seems likely that Article 7 of the E.E.C. Treaty was intended to prevent a State' discriminating against the nationals of *other* member States. But

<sup>1</sup> Article 90 of the E.C.S.C. Treaty provides:

Si un manquement à une obligation résultant du présent traité commis par une entreprise constitue également un manquement à une obligation résultant pour elle de la législation de l'État dont elle relève et si, en vertu de ladite législation, une procédure judiciaire ou administrative est engagée contre cette entreprise, l'État en question devra en aviser la Haute Autorité, qui pourra surseoir à statuer.

Si la Haute Autorité sursoit à statuer, elle est informée du déroulement de la procédure et mise en mesure de produire tous documents, expertises et témoignages pertinents. Elle sera de même informée de la décision définitive qui sera intervenue et devra tenir compte de cette décision pour la détermination de la sanction qu'elle serait éventuellement amenée à prononcer.

<sup>2</sup> Article 7 (1) of the E.E.C. Treaty provides:

Dans le domaine d'application du présent traité, et sans préjudice des dispositions particulières qu'il prévoit, est interdite toute discrimination exercée en raison de la nationalité.



its literal interpretation also prevents a State' discriminating against *its own* nationals, and that is how the Court interpreted it.

Secondly, does a difference of treatment automatically constitute discrimination? The categorical terms of the Court's judgment rather indicate that it does, although the Advocate-General Roemer suggested that there might be valid grounds for treating nationals and foreigners differently—for example, 'des difficultés de preuve au regard de justiciables étrangers ou le fait que leur comportement présente peu d'importance en raison de la part réduite qu'ils occupent sur le marché national'.<sup>1</sup>

Thirdly, there is the effect of Article 7 on the general use of nationality as a basis of jurisdiction in criminal cases. Admittedly, Article 7 would have no effect on jurisdiction over crimes such as murder and burglary, which have nothing to do with the E.E.C. Treaty in any case. But the position might be different in the case of crimes such as receiving stolen property, where the property is stolen in one country and received in another; here there is an element of inter-State trade, which brings the case within the 'domaine d'application' of the E.E.C. Treaty. If a State, in such circumstances, prosecutes its nationals for receiving stolen property abroad but does not prosecute foreigners for similar extra-territorial acts, it might well be in breach of Article 7. If, on the other hand, it tries to avoid this consequence by extending its law to cover the extra-territorial acts of foreigners, it will be violating a widely accepted principle of customary international law. The only solution is to base jurisdiction on the territorial principle (or possibly the protective principle), rather than on the principle of nationality.

If this reasoning is correct, it is clear that the Court's interpretation of Article 7 could have very far-reaching effects.

*Restrictive practices—agreements between small businesses—exclusive distribution agreements*

*Case No. 2. Völk v. S.P.R.L. Établissements J. Vervaecke.*<sup>2</sup> The plaintiff in this case manufactured washing-machines in Germany; the defendant had a chain of shops selling household electrical goods in Belgium and Luxembourg. On 15 September 1963 the parties concluded an exclusive distribution agreement, giving the defendant the sole right to market the plaintiff's machines in Belgium and Luxembourg. The parties concluded further contracts, which were supplementary to the original exclusive distribution agreement, on 1 January 1964 and 11 March 1964.

Subsequently, the plaintiff sued the defendant for breach of contract in a German court. The defendant pleaded, by way of a defence, that the contract was void because it was contrary to Article 85 of the E.E.C. Treaty. The plaintiff argued, however, that the contract was not caught by Article 85, because his turnover was too small to have a serious effect on intra-Community trade. (In 1963 his production of washing-machines amounted to only 0.2 per cent of the total number manufactured in West Germany, and the machines covered by the contract represented only 0.6 per cent of the machines sold in Belgium and Luxembourg in 1966.) The Munich Oberlandesgericht therefore put the following question to the Court of Justice of the European Communities under Article 177 of the E.E.C. Treaty:

Pour déterminer si le contrat litigieux du 15 septembre 1963 avec avenants des 1<sup>er</sup> janvier 1964 et 11 mars 1964 tombe sous le coup de l'interdiction énoncée à l'article 85, paragraphe 1, du traité C.E.E., faut-il avoir égard à la fraction du marché que le de-

<sup>1</sup> *Recueil de la jurisprudence*, 15 (1969), at p. 30.

<sup>2</sup> *Ibid.*, p. 295.

mandeur a effectivement conquise ou qu'il a fini par chercher à conquérir dans les États membres de la Communauté économique européenne, notamment en Belgique et au Luxembourg, secteur de vente pour lequel la défenderesse bénéficie d'une 'protection absolue'?

In its literal meaning, this question asked the Court to apply the Treaty to the facts of the case, a task which was beyond the powers of the Court; Article 177 merely empowers the Court to interpret the Treaty, not to apply it. The Court, however, had no difficulty in isolating the abstract problem of principle which was contained in the question, and it then proceeded to answer that problem.

Article 85 (1) of the E.E.C. Treaty provides:

Sont incompatibles avec le marché commun et interdits tous accords entre entreprises, toutes décisions d'associations d'entreprises, et toutes pratiques concertées, qui sont susceptibles d'affecter le commerce entre les États membres et qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun . . .

The Court began by interpreting the words 'susceptibles d'affecter le commerce entre les États membres':

attendu que, pour être susceptible d'affecter le commerce entre États membres, l'accord doit, sur la base d'un ensemble d'éléments objectifs de droit ou de fait, permettre d'envisager avec un degré de probabilité suffisant qu'il puisse exercer une influence directe ou indirecte, actuelle ou potentielle sur les courants d'échange entre États membres dans un sens qui pourrait nuire à la réalisation des objectifs d'un marché unique entre États.

The Court also pointed out that

. . . la prohibition de l'article 85, paragraphe 1, ne peut s'appliquer qu'à la condition que l'accord en cause ait, en outre, pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence dans le marché commun.

The Court then drew the following conclusions:

que ces conditions doivent être entendues par référence au cadre réel où se place l'accord;

que, dès lors, un accord échappe à la prohibition de l'article 85 lorsqu'il n'affecte le marché que d'une manière insignifiante, compte tenu de la faible position qu'occupent les intéressés sur le marché des produits en cause;

qu'il est donc possible qu'un accord d'exclusivité même avec protection territoriale absolue, compte tenu de la faible position des intéressés sur le marché des produits en cause dans la zone faisant l'objet de la protection absolue, échappe à l'interdiction prévue à l'article 85, paragraphe 1.

Some commentators had inferred from the Court's earlier decision in the *Grundig* case<sup>1</sup> that exclusive distribution agreements were automatically contrary to Article 85 of the E.E.C. Treaty. But such an inference reads too much into the judgment in the *Grundig* case, which can in any event be distinguished on the grounds that it dealt with well-known products enjoying a very large market. When one is dealing, on the other hand, with a manufacturer whose turnover is as small as the plaintiff's in *Völk's* case, it is unrealistic to suppose that an exclusive distribution agreement concluded by such a manufacturer could affect trade between member States; what detectable effect could it have on the volume of trade, or on price levels? By the same token, it would be unrealistic to suppose that such an agreement could prevent, restrict or

<sup>1</sup> *Recueil de la jurisprudence*, 12 (1966), p. 429.

distort competition, or that the parties could even hope to produce such results; for, even if the agreement had limited the sales of the plaintiff's machines, customers would have had no difficulty in obtaining similar machines made by other manufacturers.

Although the judgment in *Völk's* case was concerned only with exclusive distribution agreements, it is applicable by analogy to most other types of restrictive practices. But it does not give small businessmen *carte blanche* to engage in restrictive practices, because it must be read in conjunction with *S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen*,<sup>1</sup> which held that an agreement between one manufacturer and one distributor cannot be considered in isolation from similar agreements between other manufacturers and other distributors; if the combined effect of *all* the agreements produces a result which is contrary to Article 85 of the E.E.C. Treaty, then *all* the agreements are illegal. *Völk's* case is based on the principle that the legality of a restrictive practice must be determined by reference to the economic situation in which the practice takes place; but *S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen* is also based on the same principle, and, as far as the businessman is concerned, it is clear that that principle cuts both ways.

*Restrictive practices—agreements notified to the Commission—provisional validity—enforceability*

Case No. 3. *S.A. Portelange v. S.A. Smith Corona Marchant International*.<sup>2</sup> Article 85, paragraph 1, of the E.E.C. Treaty forbids 'tous accords entre entreprises, toutes décisions d'associations d'entreprises, et toutes pratiques concertées, qui sont susceptibles d'affecter le commerce entre les États membres et qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun . . .'. Paragraph 2 states that 'les accords ou décisions interdits en vertu du présent article sont nuls de plein droit'. Paragraph 3 provides that exemptions from the rule laid down in paragraph 1 may be granted in certain circumstances.

In 1962 the E.E.C. Council of Ministers enacted Regulation 17, which provided, *inter alia*, that existing restrictive practices should be notified to the Commission, which would decide whether to grant exemptions under Article 85 (3) of the Treaty. Regulation 17 also empowered the Commission to impose fines on enterprises which participated in illegal restrictive practices; but a considerable time might elapse between the notification of a restrictive practice and the Commission's decision on the question of exemption, and so Article 15 (5) of Regulation 17 provided that no fines could be imposed on the participants in such a restrictive practice during this period. But what about the validity *in civil law* of a restrictive trading contract which had been notified to the Commission? Was such a contract valid in civil law pending the Commission's decision on the question of exemption? Regulation 17 did not deal with this problem. The gap in the law was to some extent filled by the decision of the Court of Justice of the European Communities in the *Bosch* case,<sup>3</sup> which held that restrictive agreements or practices notified to the Commission were 'provisionally valid' pending the Commission's decision on the question of exemption. If the Commission subsequently granted exemption, the restrictive agreements or practices would become fully valid retroactively; if, however, the Commission refused exemption, they would become retroactively invalid as from the date of the entry into force of Regulation 17.

<sup>1</sup> *Recueil de la jurisprudence*, 13 (1967), p. 525. See the case-note in this *Year Book*, 42 (1967), p. 320.

<sup>2</sup> *Ibid.*, 15 (1969), p. 309.

<sup>3</sup> *Ibid.*, 8 (1962), p. 89.



The judgment in the *Bosch* case provoked considerable disagreement among writers and municipal courts as to the meaning of 'provisional validity'. One school of thought argued that the parties to a restrictive trading agreement were free to perform the agreement voluntarily and were under a legal obligation to co-operate with one another in order to obtain exemption under Article 85 (3) of the Treaty, but that the agreement could not be enforced in any way by municipal courts; in such circumstances, municipal courts should adjourn the case until the Commission reached its decision on the question of exemption. At the other extreme, some authorities suggested that the agreement was fully valid and fully enforceable, subject to a condition subsequent—if the Commission subsequently refused exemption, the party held liable by a municipal court for breach of contract would be able to bring an action in a municipal court for reimbursement or compensation in order to undo the effect of the earlier judgment. There were also intermediate schools of thought; for instance, it was sometimes suggested that the agreement could be enforced in municipal courts by means of an injunction, but not by means of a claim for damages.

*S.A. Portelange v. S.A. Smith Corona Marchant International* gave the Court of Justice of the European Communities a chance to clarify the meaning of provisional validity. On 1 July 1961 the defendant gave the plaintiff the exclusive right to sell and distribute the defendant's calculating machines and typewriters in Belgium and Luxembourg, and this contract was duly notified to the Commission on 31 January 1963. At an unspecified date the parties tacitly agreed to add electric copying machines to the list contained in the contract of 1 July 1961, but this tacit agreement was not notified to the Commission. On 6 October 1966 the defendant gave notice to terminate the contract in so far as it applied to electric copying machines. The plaintiff, considering that the period of notice was shorter than the minimum required by Belgian law, brought an action for breach of contract before the Brussels Tribunal de commerce. The defendant pleaded that the contract was void by virtue of Article 85 (2) of the E.E.C. Treaty, but the plaintiff argued that it was 'provisionally valid', in accordance with the judgment in the *Bosch* case. The Tribunal de commerce therefore referred the case to the Court of Justice of the European Communities under Article 177 of the Treaty, in order to clarify the meaning of 'provisional validity'.

The Commission of the European Communities, which intervened in the proceedings before the Court of Justice of the European Communities, and the Advocate-General Roemer argued that the Court should refuse to answer the question put by the Tribunal de commerce, on the grounds that the case before the Tribunal de commerce did not concern the original contract of 1 July 1961, which had been notified to the Commission, but the subsequent tacit agreement, which had not been notified and which was therefore ineligible for exemption; the question of provisional validity was consequently irrelevant to the case before the Tribunal de commerce. The Court, however, rejected this argument:

attendu que l'article 177 du traité, basé sur une nette séparation de fonctions entre les juridictions nationales et la Cour, ne permet à celle-ci de connaître des faits de l'espèce, ni de censurer les motifs des demandes en interprétation;

que la question de savoir si les dispositions ou les notions de droit communautaire dont l'interprétation est demandée sont effectivement applicables au cas d'espèce échappe à la compétence de la Cour et relève de celle de la juridiction nationale;

que, dès lors qu'une juridiction demande l'interprétation d'un texte communautaire ou d'une notion juridique rattachée à ce texte, il y a lieu de considérer qu'elle estime cette interprétation nécessaire à la solution du litige dont elle est saisie;

que l'exception soulevée par la Commission ne saurait donc être retenue.

This ruling is not altogether easy to reconcile with the Court's dictum in the *Salgoil* case:<sup>1</sup>

que, tant que l'évocation du texte dont il s'agit n'est pas manifestement erronée, la Cour est valablement saisie . . .

It may be that the dictum in the *Salgoil* case is no longer good law; alternatively, it is possible that the idea of 'l'évocation du texte' being 'manifestement erronée' should be confined to the situation where the provision which the Court is asked to interpret is irrelevant, not only to the facts of the case, but also to the actual question put to the Court.

Turning to the question raised by the Tribunal de commerce, the Court said:

attendu que la rédaction de l'article 85 du traité est caractérisée par la formulation d'une règle d'interdiction (paragraphe 1) et de ses effets (paragraphe 2), tempérée par l'exercice d'un pouvoir d'octroi de dérogations à cette règle (paragraphe 3);

qu'ainsi l'application à un accord déterminé, ou à certaines de ses clauses, de la nullité de plein droit suppose que cet accord tombe sous le coup du paragraphe 1 de l'article précité et qu'il ne puisse se prévaloir des dispositions du paragraphe 3;

que pour permettre aux intéressés d'invoquer les dispositions de l'article 85, paragraphe 3, le règlement no. 17 prévoit que les accords ou décisions visés à l'article 85, paragraphe 1, doivent être notifiés à la Commission;

que, dans le cas d'un accord notifié conformément au règlement no. 17, le simple fait de sa notification ne saurait impliquer que l'accord tombe sous l'interdiction instituée par l'article 85, paragraphe 1;

que la question de savoir si un tel accord est effectivement interdit repose sur l'appréciation d'éléments économiques et juridiques qui ne sauraient être supposés acquis en dehors de la constatation explicite que l'espèce, considérée dans son individualité, réunit non seulement les éléments énoncés par le paragraphe 1 de l'article susdit, mais encore ne justifie pas la dérogation prévue par le paragraphe 3;

qu'aussi longtemps qu'une telle constatation n'est pas intervenue, tout accord dûment notifié doit être considéré comme valable;

que, vu l'absence de possibilités juridiques efficaces permettant aux intéressés d'accélérer l'adoption d'une décision au sens de l'article 85, paragraphe 3, dont les conséquences sont d'autant plus graves qu'est considérable le délai utilisé pour parvenir à une telle décision, il serait contraire au principe général de la sécurité juridique de tirer du caractère non définitif de la validité des accords notifiés la conclusion qu'aussi longtemps que la Commission n'aurait pas statué à leur égard en vertu de l'article 85, paragraphe 3, du traité, leur efficacité ne serait pas entière.

The Court acknowledged that its interpretation 'peut éventuellement donner lieu à des inconvénients pratiques' (the Court seems to have been thinking of the situation where a party is held liable for the breach of a contract which is subsequently declared to be illegal and void); but it pointed out that 'les difficultés qui pourraient découler du caractère incertain des relations juridiques fondées sur les accords notifiés seraient beaucoup plus préjudiciables encore'.<sup>2</sup>

<sup>1</sup> *Recueil de la jurisprudence*, 14 (1968), pp. 661, 672.

<sup>2</sup> Cf. the Advocate-General Roemer: '... il y a l'intérêt à l'exécution d'accords qui ont été valablement conclus et dont la violation entraîne souvent l'effondrement définitif de tout un système... En effet, dans le cas où l'exemption est refusée par la suite, il semblerait plus approprié d'inviter celui qui a résilié un contrat à exercer une action en compensation plutôt que d'exposer celui qui est resté fidèle au contrat au risque d'un préjudice irréparable du fait de l'exclusion de la possibilité de faire sanctionner l'accord par les tribunaux' (ibid., 15 (1969), p. 326).

Similarly, the plaintiff argued that the unenforceability of restrictive contracts notified to the

There was a danger that agreements which were manifestly contrary to Article 85 (1) of the Treaty, and manifestly ineligible for exemption under Article 85 (3), would be notified to the Commission for the sole purpose of taking advantage of the delay which was bound to elapse before the Commission decided that the agreements were illegal. The Court pointed out, however, that the Commission had a weapon to deal with this sort of manœuvre; Article 15 (6) of Regulation 17 provides that Article 15 (5) (which prevents fines being imposed on the enterprises concerned until the Commission has decided to refuse exemption under Article 85 (3) of the Treaty) shall cease to apply 'dès lors que la Commission a fait savoir aux entreprises intéressées qu'après examen provisoire elle estime que les conditions d'application de l'article 85, paragraphe 1, sont remplies et qu'une application de l'article 85, paragraphe 3, n'est pas justifiée'.<sup>1</sup> The Court pointed out:

que, dès lors qu'il a été fait application du paragraphe 6 de l'article 15 précité, . . . c'est . . . à leurs propres risques que les intéressés poursuivraient, à partir de ce moment, l'exécution de l'accord.

Indeed, the Court seems to have considered that a decision under Article 15 (6) would deprive the agreement of its validity at civil law, because the Court said immediately afterwards:

qu'il y a donc lieu de conclure que les accords visés à l'article 85, paragraphe 1, du traité, dûment notifiés en vertu du règlement no. 17, reçoivent leur plein effet aussi longtemps que la Commission n'a pas statué en vertu de l'article 85, paragraphe 3, *et des dispositions dudit règlement* (italics added).

Bearing in mind the facts of the case, one might suppose that the Court's judgment in the *Portelange* case (like its earlier judgment in the *Bosch* case) was concerned exclusively with restrictive agreements concluded *before* the entry into force of Regulation 17. If this were so, the judgment would have only a temporary relevance, for the time is bound to come, if it has not already come, when the Commission will have reached a decision concerning all such agreements which were notified to it, so that the question of their provisional validity will become of purely historical interest. But the provisions of Regulation 17 concerning the notification of agreements concluded after its entry into force are very similar to the provisions concerning the notification of agreements concluded before its entry into force, and, although the policy arguments in favour of 'provisional validity' are not quite so strong in the case of the 'new' agreements as they are in the case of the 'old' agreements, it seems probable that 'new' agreements are provisionally valid in exactly the same way as 'old' agreements. Indeed, the Court's judgment in the *Portelange* case is phrased in terms wide enough to cover *all* agreements, irrespective of their date of conclusion.

Commission, pending the Commission's decision on the question of exemption, 'aurait pour conséquence que tout accord provisoirement valable pourrait être impunément violé, étant donné que les instances juridictionnelles appelées à en assurer le respect ne sauraient intervenir aussi longtemps que la Commission n'aurait pas statué à son égard. Il en découlerait une véritable insécurité juridique, et l'on ne saurait éviter, dans bien des cas, que des préjudices, parfois considérables, soient causés aux intéressés, préjudices pratiquement impossibles à réparer par la suite' (ibid., p. 312).

<sup>1</sup> For further discussion of Article 15 (6), see *Société Anonyme Cimenteries C.B.R. Cements-bedrijven N.V. and others v. E.E.C. Commission*, ibid., 13 (1967), p. 93, and the commentary in this *Year Book*, 42 (1967), p. 316.



*Tortious liability of the European Communities—vicarious liability for the acts of officials*

*Case No. 4. Sayag and another v. Leduc and others (No. 2).*<sup>1</sup> Article 188 (2) of the Euratom Treaty, which corresponds to Article 215 (2) of the E.E.C. Treaty, provides:

En matière de responsabilité non contractuelle, la Communauté doit réparer, conformément aux principes généraux communs aux droits des États membres, les dommages causés par ses institutions ou par ses agents dans l'exercice de leurs fonctions.

The Court of Justice of the European Communities has already decided a few cases about the direct tortious liability of the Communities,<sup>2</sup> but *Sayag v. Leduc* is the first case decided by the Court dealing with the Community's liability for 'les dommages causés . . . par ses agents dans l'exercice de leurs fonctions'.

The case arose out of a road accident on 25 November 1963. M. Sayag, an engineer employed by Euratom, was driving two executives from private firms to visit the Centre commun de recherches nucléaires at Mol, Belgium. Euratom had authorized him to use his private car for the journey, which was on official business. During the journey an accident occurred and the two passengers were injured. Criminal proceedings were started against M. Sayag in the Belgian courts, and the two passengers intervened as *parties civiles*. M. Sayag pleaded immunity under Article 11 (a) of the Protocol on the privileges and immunities of Euratom, which accords immunity to Euratom officials 'pour les actes accomplis par eux . . . en leur qualité officielle'. The Belgian Cour de cassation asked the Court of Justice of the European Communities to interpret this provision, in accordance with Article 150 of the Euratom Treaty (which corresponds to Article 177 of the E.E.C. Treaty). The *dispositif* of the judgment given by the Court of Justice of the European Communities reads as follows:

1. L'immunité de juridiction prévue par l'article 11, a, du protocole sur les privilèges et immunités de la C.E.E.A.—article 12, a, du protocole sur les privilèges et immunités des Communautés européennes—s'applique exclusivement aux actes qui, par leur nature, représentent une participation de celui qui invoque l'immunité à l'exercice des tâches de l'institution dont il relève;

2. Plus particulièrement, le fait de conduire un véhicule automobile ne revêt la nature d'un acte accompli en qualité officielle que dans les cas exceptionnels où cette activité ne saurait être accomplie autrement que sous l'autorité de la Communauté et par ses agents mêmes.<sup>3</sup>

Relying on this judgment, the Belgian Cour de cassation rejected M. Sayag's plea of immunity.

However, M. Sayag also pleaded that he had been acting 'dans l'exercice de [ses] fonctions' at the time of the accident, and that the Community was therefore liable under Article 188 (2) of the Euratom Treaty. He further maintained that the existence of liability on the part of the Community relieved him of personal liability; consequently, the action should have been brought against the Community in the Court of the Communities,<sup>4</sup> and not against M. Sayag in the Belgian courts. Alternatively, even

<sup>1</sup> *Recueil de la jurisprudence*, 15 (1969), p. 329.

<sup>2</sup> Notably *Firma E. Kampffmeyer and others v. E.E.C. Commission*, *ibid.*, 13 (1967), p. 317; see the commentary in this *Year Book*, 42 (1967), p. 311.

<sup>3</sup> *Sayag and another v. Leduc and others (No. 1)*, *Recueil de la jurisprudence*, 14 (1968), pp. 575, 586-7.

<sup>4</sup> Article 151 of the Euratom Treaty provides:

La Cour de justice est compétente pour connaître des litiges relatifs à la réparation des dommages visés à l'article 188, alinéa 2.

if the Community's liability did not destroy his own liability, he considered that his own liability, like that of the Community, should be determined by the Court of the Communities in accordance with the general principles of law common to the member States, and not by Belgian courts in accordance with Belgian law.

The Belgian Cour de cassation therefore put a second question to the Court of Justice of the European Communities, in accordance with Article 150 of the Euratom Treaty. It asked the Court of Justice of the European Communities to pronounce

... sur l'interprétation à donner aux articles 188, alinéa 2, et 151 du traité instituant la Communauté européenne de l'énergie atomique, en définissant le sens de l'expression 'dans l'exercice de leurs fonctions', et, pour le cas où un fait dommageable aurait été commis dans l'exercice de ses fonctions par un agent n'ayant pas agi en qualité officielle,<sup>1</sup> en disant si ce fait donne ouverture à la responsabilité personnelle de l'agent ou si cette responsabilité est absorbée par celle de la Communauté, et éventuellement en précisant le régime juridique applicable à l'action en responsabilité contre l'agent et son assureur et en disant si la juridiction compétente pour connaître de cette action est exclusivement celle prévue par l'article 151 du traité.

In its judgment, the Court of Justice of the European Communities replied:

qu'il apparaît du dossier que les questions posées concernent le cas d'un fonctionnaire de la C.E.E.A. qui, muni d'un ordre de mission, se déplace au volant de sa voiture personnelle en vue d'accomplir une mission et est l'auteur d'un accident;

qu'ainsi est soulevée en premier lieu la question de savoir si, tout en n'agissant pas en sa qualité officielle au sens de l'article 11 du protocole sur les privilèges et immunités annexé au traité de la C.E.E.A., un tel fonctionnaire peut être considéré comme se trouvant dans l'exercice de ses fonctions au sens de l'article 188, alinéa 2, de ce traité;

attendu qu'en matière de responsabilité non contractuelle le traité soumet la Communauté à une réglementation propre à l'ordre juridique communautaire, qui la place sous une règle unitaire pour la réparation des dommages causés par ses institutions et par ses agents dans l'exercice de leurs fonctions;

que le traité assure l'application uniforme de cette règle et l'autonomie des institutions de la Communauté, en soumettant les litiges en cette matière à la compétence de la Cour de justice;

qu'en désignant à la fois les dommages causés par les institutions et ceux causés par les agents de la Communauté, l'article 188 indique que la Communauté n'est responsable que de ceux des actes de ses agents qui, en vertu d'un rapport interne et direct, constituent le prolongement nécessaire des missions confiées aux institutions;

qu'en considération du caractère spécial de ce régime juridique, il ne serait pas loisible de l'étendre aux actes accomplis en dehors des cas ainsi caractérisés;

que l'utilisation par un agent de sa voiture personnelle pour se déplacer lors de l'accomplissement de son service ne répond pas aux conditions définies ci-dessus;

que la mention de la voiture personnelle de l'agent dans un ordre de mission ne fait pas entrer l'activité de conduire cette voiture dans l'exercice de ses fonctions, mais vise essentiellement à permettre, le cas échéant, le remboursement des frais de voyage l'acafférents à l'usage d'un tel moyen de transport, selon les critères prévus à cet effet;

que seulement en cas de force majeure ou de circonstances exceptionnelles si impérieuses que sans l'utilisation par l'agent d'un moyen de transport personnel la Communauté n'aurait pu exécuter les missions qui lui sont confiées, cette utilisation pourrait être considérée comme constituant l'exercice par l'agent de ses fonctions, au sens de l'article 188, alinéa 2, du traité;

<sup>1</sup> If the official had been acting 'en qualité officielle', Article 11 (a) of the Protocol on the privileges and immunities of Euratom would have given him immunity from the jurisdiction of municipal courts, so that the problems raised by M. Sayag's arguments could not have arisen (unless immunity had been waived, of course).

attendu qu'il résulte de ce qui précède que la conduite par un agent de sa voiture personnelle ne peut, en principe, constituer l'exercice de ses fonctions, au sens de l'article 188, alinéa 2, du traité de la C.E.E.A.;

que, dès lors, il n'est pas nécessaire d'examiner les questions posées à titre subsidiaire.

The Court's judgment has several notable features.

In the first place, it makes no mention of the 'principes communs aux droits des États membres'. This may be because the laws of the member States are so divergent on this point that they do not provide a useful answer.<sup>1</sup> Alternatively, it could be argued that the interpretation of 'dans l'exercice de leurs fonctions' must be based exclusively on the Treaty; it is only *after* the Court has decided that an official was acting 'dans l'exercice de [ses] fonctions' that general principles of law become relevant, in order to determine whether the official's act was tortious.

Secondly, the Court's restrictive definition of 'dans l'exercice de leurs fonctions' closely resembles the Court's restrictive definition of 'en leur qualité officielle'. There are sound policy reasons for deciding the question of immunity and the question of liability in accordance with the same criteria;<sup>2</sup> moreover, from the practising lawyer's point of view, the Court's approach greatly simplifies the law, by making it unnecessary to answer the difficult subsidiary questions raised by the Belgian Cour de cassation.<sup>3</sup>

However, the effect of the Court's judgment is to limit severely the Communities' vicarious liability, and to place the exclusive responsibility for paying compensation for road accidents on the shoulders of the Communities' officials. This, by itself, may not matter much, because officials who are authorized to use their own cars on official business are required by Article 12 (4) of Annex VII to the Staff Regulations to take out third-party insurance. However, if the Court's judgment is to be applied by analogy to tortious acts other than road accidents, it could cause hardship for the victims of such acts, because the defendant official might be unable to pay the damages awarded and the Community would be under no legal obligation to pay compensation. An *ex gratia* payment by the Community would clearly be desirable in such circumstances, although it would be better if the Community were under a legal obligation to pay compensation.

*Interpretation of Community decisions—multilingual decisions—invalidity of decisions which conflict with general principles of constitutional law*

*Case No. 5. Stauder v. City of Ulm (Sozialamt).*<sup>4</sup> In an attempt to alleviate the notorious problems caused by the Community's over-production of butter, the Commission of the European Communities decided on 12 February 1969 to authorize member States to sell butter at a reduced price to the recipients of certain welfare benefits. Since the butter was to be sold by ordinary retailers, it was necessary to provide for safeguards, in order to make sure that this concession benefited only the persons whom it was meant to benefit. Accordingly, Article 4 of the decision of 12 February 1969 provided (in the German and Dutch texts) that a beneficiary would

<sup>1</sup> The divergences are outlined by the Advocate-General Gand (*Recueil de la jurisprudence*, 15 (1969), pp. 340-2). In fact, his own answers to the questions put by the Belgian Cour de cassation make little reference to general principles of law (*ibid.*, pp. 342-6).

<sup>2</sup> See the remarks by the Commission of the European Communities and the Advocate-General Gand (*ibid.*, pp. 332 and 339).

<sup>3</sup> See the answers to these questions suggested by the Advocate-General Gand (*ibid.*, pp. 344-5).

<sup>4</sup> *Ibid.*, p. 419.



be able to buy butter at a reduced price only upon presentation of a coupon bearing his name. However, the French and Italian texts spoke only of the presentation of a *bon individualisé* (*buono individualizzato*), thus enabling member States to apply safeguards which did not entail the inscription of the beneficiary's name on the coupons. Acting in accordance with the German text of Article 4, the German Government issued cards consisting of coupons detachable from a stub; retailers were only allowed to accept coupons which were still attached to the stub, which had to bear the name and address of the beneficiary.

The plaintiff, who received welfare benefits as a war victim, was entitled to buy butter at a reduced price, but considered that the requirement that the beneficiary's name should appear on the stub was contrary to Articles 1 and 3 of the Basic Law of the German Federal Republic.<sup>1</sup> He therefore instituted proceedings in the Federal Constitutional Court, asking it to declare this requirement unconstitutional. He also applied to the Stuttgart Administrative Court for an interim injunction against the city of Ulm, in order to prevent the enforcement of this requirement, pending the hearing of his case by the Constitutional Court.

On 18 June 1969 the Stuttgart Administrative Court asked the Court of Justice of the European Communities to answer a question, under Article 177 of the E.E.C. Treaty, concerning the validity of Article 4 of the Commission's decision of 12 February 1969. According to the Administrative Court, Article 4 made it impossible to prevent the beneficiary's name being revealed to traders, who did not normally take part in distributing welfare benefits; the Administrative Court thought that this result was contrary to German ideas of welfare and to the German system of protecting fundamental rights, and that the requirement of Article 4 was therefore illegal. The Administrative Court seems to have considered that the fundamental rights guaranteed by the Basic Law also formed part of Community law; and it asked the Court of Justice of the European Communities:

Peut-on considérer comme compatible avec les principes généraux du droit communautaire en vigueur le fait que la décision de la Commission des Communautés européennes du 12 février 1969 (69/71/CEE) lie la cession de beurre à prix réduit aux bénéficiaires de certains régimes d'assistance sociale à la divulgation du nom du bénéficiaire aux vendeurs (loc. cit., article 4)?

Before answering this question, the Court of Justice of the European Communities had to interpret the decision of 12 February 1969, in order to see whether it really did require 'la divulgation du nom du bénéficiaire aux vendeurs'.

The Advocate-General Roemer, after drawing attention to the discrepancy between the German and Dutch texts, on the one hand, and the French and Italian texts, on the other hand, pointed out that the Commission's decision was intended to be applied uniformly in all the member States, and that the process of interpretation must therefore seek to eliminate the differences between the different texts. However, he found it unnecessary to lay down any general rules of interpretation, because it was clear from the *travaux préparatoires* that the French and Italian texts reflected the Commission's intentions, and that the different wording of the German and Dutch texts was the result of a mistranslation. Indeed, on 29 July 1969 the Commission had

<sup>1</sup> Article 1 (1) of the Basic Law provides:

'The dignity of man is inviolable. To respect and protect it shall be the duty of all State authority.'

Article 3 (1) provides:

'All persons shall be equal before the law.'

altered the wording of the German and Dutch texts, in order to bring them into line with the French and Italian texts; this alteration was retroactive to the date of the entry into force of the original decision of 12 February 1969.<sup>1</sup>

The Court of Justice of the European Communities, unlike the Advocate-General, seized the opportunity to enunciate some general rules of interpretation:<sup>2</sup>

attendu que, lorsqu'une décision unique est adressée à tous les États membres, la nécessité d'une application et dès lors d'une interprétation uniformes exclut que ce texte soit considéré isolément dans une de ses versions, mais exige qu'il soit interprété en fonction, tant de la volonté réelle de son auteur que du but poursuivi par ce dernier, à la lumière notamment des versions établies dans toutes les langues.

These principles are unexceptionable, but the Court then entered a more controversial area by invoking the principle of restrictive interpretation:

que dans un cas comme celui de l'espèce, l'interprétation la moins contraignante doit prévaloir, si elle suffit à assurer les objectifs que se propose la décision dont s'agit;

qu'on ne saurait en outre admettre que les auteurs de la décision aient voulu, dans certains pays membres, imposer des obligations plus strictes que dans d'autres.

The Court went on to repeat the Advocate-General's arguments based on the *travaux préparatoires*, and concluded:

qu'il s'ensuit que la disposition litigieuse doit être interprétée comme n'imposant pas—sans toutefois l'interdire—l'identification nominative des bénéficiaires;

que la Commission a pu ainsi publier, le 29 juillet 1969, une décision rectificative dans ce sens;

que chacun des États membres est dès lors en mesure de choisir parmi diverses méthodes d'individualisation;

qu'ainsi interprétée, la disposition litigieuse ne révèle aucun élément susceptible de mettre en cause les droits fondamentaux de la personne compris dans les principes généraux du droit communautaire, dont la Cour assure le respect.

Even if the supposed requirement about revealing the beneficiary's name is contrary to German constitutional law, it is hard to imagine that it is contrary to the constitutional laws of the other member States. However, it is clear from the Court's judgment that 'les droits fondamentaux de la personne' which are common to the constitutional laws of the member States do form part of 'les principes généraux du droit communautaire, dont la Cour assure le respect', and that a regulation or decision will be voidable if it conflicts with them.<sup>3</sup> To that extent, the judgment in *Stauder's* case represents a landmark in the development of judicial review in the European Communities.

<sup>1</sup> *Recueil de la jurisprudence*, 15 (1969), pp. 428-9.

<sup>2</sup> It does not by any means follow that the rules laid down by the Court concerning the interpretation of Community decisions are necessarily applicable by analogy to the interpretation of treaties. Community decisions differ from treaties in several important respects. For instance, a statement made by a State during the conclusion of a treaty can constitute a reservation, modifying the scope of the treaty; a similar statement made at a meeting of the Council of Ministers of the European Communities cannot affect the scope of the Council's decision unless it is actually incorporated into the text of the decision (*Commission of the European Communities v. Italian Republic*, *ibid.*, 16 (1970), p. 47). Admittedly the problem of reservations is different from the problem of interpretation, but the problem of reservations does nevertheless demonstrate that the rules governing Community decisions are not necessarily the same as the rules governing treaties.

<sup>3</sup> See also the Advocate-General's remarks, *ibid.*, 15 (1969), p. 428.

*Restrictive practices—agreements which do not need to be notified to the Commission—validity of such agreements*

*Case No. 6. Firma Brauerei A. Bilger Söhne G.m.b.H. v. Heinrich Jehle and Marta Jehle.*<sup>1</sup> Herr and Frau Jehle owned two restaurants at Friedrichshafen. In 1950 they entered into an agreement with the Bilger brewery, whereby the brewery lent them money and equipment; in return, the Jehles agreed to buy all the beer needed for their restaurants exclusively from the Bilger brewery. The Jehles also undertook to impose similar obligations on anyone who subsequently leased either of their restaurants. The agreement was never notified to the Commission of the European Communities.

In 1962 the Jehles leased one of their restaurants to a third party, while continuing to manage the other restaurant. At the same time the Jehles and their lessee began to sell special beers from other breweries in the two restaurants, in addition to beer from the Bilger brewery. The brewery brought an action against the Jehles for breach of contract; the Jehles pleaded that the contract was void under German law. The case was heard by the Landgericht, the Oberlandesgericht and the Bundesgerichtshof, which remitted the case for rehearing before the Oberlandesgericht. It was only at this stage that the Jehles pleaded that the contract was also void by virtue of Article 85 of the E.E.C. Treaty, which forbids and declares void 'tous accords entre entreprises, toutes décisions d'associations d'entreprises, et toutes pratiques concertées, qui sont susceptibles d'affecter le commerce entre les États membres et qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun . . . '.

The agreement in the present case was hardly likely, on its own, to affect trade between member States or to restrict competition within the Common Market; the Jehles's two restaurants sold less than 3,000 gallons of beer a year, and the Bilger factory accounted for only 0.3 per cent of the production of beer in West Germany. But the Jehles relied on *S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen*,<sup>2</sup> a case involving very similar facts, where the Court of Justice of the European Communities had held that, in order to determine the legality of such an agreement, it was legitimate to take into account the existence of similar agreements between other manufacturers and other retailers; if the combined effect of *all* such agreements was to affect trade between member States by restricting competition within the Common Market, then *each* of the agreements was contrary to Article 85. According to the Jehles, 80 per cent of the inn-keepers in West Germany were bound by such agreements and 60 per cent of the beer produced in West Germany was sold under such agreements, with the result that trade in beer between member States was limited, because breweries in other member States found it difficult to break into the German market.

The Oberlandesgericht therefore put two questions to the Court of Justice of the European Communities under Article 177 of the E.E.C. Treaty.

The first question raised the problem whether agreements of the type in dispute needed to be notified to the Commission of the European Communities. Articles 4 (2) (i) and 5 (2) of Regulation 17 exempt restrictive agreements, decisions and practices from compulsory notification 'lorsque n'y participent que des entreprises ressortissantes à un seul État membre et que ces accords, décisions ou pratiques ne concernent ni l'importation ni l'exportation entre États membres'. The parties in the present case were carrying on business in the same member State, and the Court of Justice of the European Communities held that in these circumstances there was no need to

<sup>1</sup> Ibid., 16 (1970), p. 127.

<sup>2</sup> Ibid., 13 (1967), p. 525. See the case-note in this *Year Book*, 42 (1967), p. 320.



notify such agreements to the Commission. Seen in the context of the existence of similar agreements between other manufacturers and other retailers, such agreements might have an (indirect) effect on trade between member States within the meaning of Article 85, but they were not themselves concerned with exports or imports between member States; the expression 'concerner l'importation ou l'exportation' had a narrower meaning than 'affecter le commerce entre États membres'. The Court therefore ruled:

Un contrat entre producteur et détaillant autonome, par lequel ce dernier s'engage à se fournir exclusivement chez ledit producteur, établi dans le même État membre, et dont l'exécution n'appelle pas le franchissement de frontières nationales par les marchandises en cause, ne concerne ni l'importation ni l'exportation entre États membres, au sens de l'article 4, paragraphe 2, no. 1, du règlement no. 17, et est, par conséquence, dispensé de notification.

The Court then turned to the second question raised by the Oberlandesgericht.

attendu que, pour le cas où les questions précédentes recevraient une réponse négative, la juridiction nationale invite la Cour à dire 'comment il faut interpréter l'article 85, paragraphe 2, du traité C.E.E. pour les accords qui ne doivent pas être notifiés, compte tenu de la rétroactivité possible d'une décision d'exemption prise par la Commission en vertu de l'article 85, paragraphe 3, du traité C.E.E. . . .'<sup>1</sup> et, plus particulièrement, à se prononcer sur la question de savoir si 'un accord qui ne doit pas être notifié est provisoirement valable'.<sup>2</sup>

The Oberlandesgericht treated these questions as relating to the *merits* of the case; the Court of Justice of the European Communities, on the other hand, seems to have approached them more in terms of the *jurisdiction* of municipal courts under the E.E.C. Treaty:

que ces questions, envisagées dans le cadre juridique du litige au principal, tendent à savoir si le juge national a compétence pour statuer sur la nullité, au regard du droit communautaire, d'un accord qui, tout en relevant de l'article 85, paragraphe 1, du traité, est dispensé de notification et n'a pas été notifié;

attendu qu'aux termes de l'article 9, paragraphe 3, du règlement no. 17, 'aussi longtemps que la Commission n'a engagé aucune procédure en application des articles 2, 3 ou 6' du règlement, 'les autorités des États membres restent compétentes pour appliquer les dispositions de l'article 85, paragraphe 1 . . . conformément à l'article 88 du traité';

que ledit article 88 renvoie aux règles de compétence et de procédure nationales, de sorte que la notion d' 'autorités des États membres' englobe les juridictions nationales;

que, d'autre part, la faculté d'appliquer l'article 85, paragraphe 1, implique nécessairement celle de faire application du deuxième paragraphe du même article, frappant de nullité 'les accords interdits en vertu du présent article';

attendu que, s'agissant de préciser la période pour laquelle les juridictions nationales peuvent admettre cette nullité, les articles 88 du traité et 9, paragraphe 3, du règlement no. 17 sont muets à cet égard;

<sup>1</sup> Paragraph 1 of Article 85 forbids various categories of restrictive practices. Paragraph 3 provides that exemptions from paragraph 1 may be granted in certain circumstances. Paragraph 2 provides that agreements and decisions forbidden by Article 85 are void.

<sup>2</sup> In the *Bosch* case (*Recueil de la jurisprudence*, 8 (1962), p. 89), the Court held that restrictive practices which were in existence when Regulation 17 entered into force, and which were notified to the Commission in accordance with the requirements of Regulation 17, were 'provisionally valid' pending the Commission's decision whether or not to grant exemption under Article 85 (3). The meaning of 'provisional validity' was clarified by the Court in the *Portelange* case (see above, p. 236). What the Oberlandesgericht was asking in effect was whether agreements which were not subject to compulsory notification should be treated in the same way as agreements which were notified in accordance with the requirements of Regulation 17.

que, cependant, on ne saurait considérer que des accords, conclus avant ou après le 13 mars 1962 et qui sont, par le règlement no. 17 même, dispensés de notification, puissent être, avec rétroactivité, frappés de nullité s'ils devaient être ultérieurement reconnus passibles des paragraphes 1 et 2 de l'article 85;

que, si les institutions de la Communauté peuvent, sous les conditions prévues à l'article 85, paragraphe 3, exempter entièrement des accords de l'interdiction et de la nullité de l'article 85, il s'ensuit qu'elles ont pu, en dispensant certains accords de toute notification par le règlement no. 17, admettre que le risque de nullité auquel ces accords restaient soumis, n'aurait d'effet éventuel qu'à compter du jour de sa constatation;

que, d'autre part, une solution différente compromettrait gravement la sécurité juridique et cela au détriment de parties qui, ayant passé un accord dispensé de notification parce que considéré comme peu susceptible d'affecter le commerce entre États membres, pouvaient raisonnablement s'attendre à ce que cet accord sorte, à cet égard, au moins le même effet que les accords notifiés, conclus antérieurement au 13 mars 1962.

The Court therefore ruled:

Un accord dispensé de notification et n'ayant pas été notifié sort son plein effet aussi longtemps que sa nullité n'a pas été constatée.

The remarkable thing about the judgment is that it does not say who is authorized to 'constater la nullité' of the agreement. Obviously this power belongs to the Commission; but is it shared with the courts and other authorities of member States? In view of what the Court said in the *Portelange* case about the interrelationship of the three paragraphs of Article 85 (see above, p. 238), and in view of the fact that the Commission alone may grant exemption under Article 85 (3), one might imagine that the Commission's power was exclusive; on the other hand, if the Court had intended to limit the power of national courts, it would surely have said so expressly. At all events, under Article 9 (3) of Regulation 17, the parties can prevent national authorities acting by applying to the Commission for negative clearance under Article 2 of Regulation 17, or for exemption under Article 85 (3) of the Treaty and Article 6 of Regulation 17.

According to the *Portelange* case, agreements which were in existence before the entry into force of Regulation 17, and which were notified in accordance with the requirements of Regulation 17, are valid, subject to a condition subsequent—if the Commission subsequently decides that they are contrary to Article 85, they become void retroactively.<sup>1</sup> This condition subsequent does not seem to apply to agreements which do not need to be notified; the nullity of such agreements 'n'aurait d'effet éventuel qu'à compter du jour de sa constatation'; 'on ne saurait considérer que des accords, conclus avant ou après le 13 mars 1962 et qui sont, par le règlement no. 17 même, dispensés de notification, puissent être, avec rétroactivité, frappés de nullité s'ils devaient être ultérieurement reconnus passibles des paragraphes 1 et 2 de l'article 85' (italics added). It should also be noted that the Court applies this rule not only to agreements concluded before 13 March 1962 (the date when Regulation 17 entered into force), but also to agreements concluded after that date.

*Monetary policy—emergency measures taken to deal with a balance of payments crisis—division of powers between national and Community authorities*

*Case No. 7. Commission of the European Communities v. French Republic.*<sup>2</sup> For many years the Banque de France operated a rediscount rate for exports which was lower

<sup>1</sup> See above, p. 236.

<sup>2</sup> *Recueil de la jurisprudence*, 15 (1969), p. 523.

than the rediscount rate for domestic transactions. From 1964 onwards the E.E.C. Commission, considering that the preferential rediscount rate was contrary to Article 92 of the E.E.C. Treaty,<sup>1</sup> tried to persuade France to abolish it in so far as it applied to exports to other member States of the E.E.C. Correspondence between the Commission and the French Government continued for several years without any results, but on 13 May 1968 the French Government, without admitting that the preferential rediscount rate was contrary to the treaties setting up the Communities, informed the Commission of the European Communities that it was studying the possibility of abolishing the preferential rediscount rate as from 1 July 1968.

However, in May and June 1968 a series of strikes and inflationary wage settlements took place in France, which endangered the French balance of payments, and on 12 June 1968 France informed the Commission that she hoped the Commission would authorize France temporarily to maintain a preferential rediscount rate for exports. On 24 June 1968 France informed the Commission that she was taking various emergency measures, including a reduction of the rediscount rate for exports from 3 per cent to 2 per cent; this reduced rate was to last from 1 July 1968 to 31 January 1969. (The rediscount rate for domestic transactions remained unchanged at 3½ per cent until 5 July 1968, when it was increased to 5 per cent.) On 26 June 1968 France explained that these measures, in so far as they concerned products covered by the E.E.C. Treaty, were based on Articles 104-9 of the Treaty, and especially on Article 109;<sup>2</sup> in so far as they concerned products covered by the E.C.S.C. Treaty, their legal basis was still being examined by the French Government. On 30 June 1968 the Banque de France lowered the rediscount rate for exports from 3 per cent to 2 per cent.

On 6 July 1968 the Commission took a decision under Article 67 (2) (ii) of the E.C.S.C. Treaty,<sup>3</sup> authorizing France to provide various forms of assistance for the

<sup>1</sup> Article 92 (1) provides:

Sauf dérogations prévues par le présent traité, sont incompatibles avec le marché commun, dans la mesure où elles affectent les échanges entre les États membres, les aides accordées par les États ou au moyen de ressources d'État sous quelque forme que ce soit, qui faussent ou qui menacent de fausser la concurrence en favorisant certaines entreprises ou certaines productions.

Paragraphs 2 and 3 of Article 92 lay down various exceptions which are not relevant to the present case.

<sup>2</sup> Article 109 provides:

1. En cas de crise soudaine dans la balance des paiements et si une décision au sens de l'article 108, paragraphe 2, n'intervient pas immédiatement, l'État membre intéressé peut prendre, à titre conservatoire, les mesures de sauvegarde nécessaires. Ces mesures doivent apporter le minimum de perturbations dans le fonctionnement du marché commun et ne pas excéder la portée strictement indispensable pour remédier aux difficultés soudaines qui se sont manifestées.

2. La Commission et les autres États membres doivent être informés de ces mesures au plus tard au moment où elles entrent en vigueur. . . .

3. Sur l'avis de la Commission et après consultation du Comité monétaire, le Conseil, statuant à la majorité qualifiée, peut décider que l'État intéressé doit modifier, suspendre ou supprimer les mesures de sauvegarde susvisées.

Article 108 (2) authorizes the Council of Ministers, on the recommendation of the Commission, to provide 'concours mutuel' for a member State facing balance-of-payments difficulties. Article 108 (3) provides:

Si le concours mutuel recommandé par la Commission n'a pas été accordé par le Conseil ou si le concours mutuel accordé et les mesures prises sont insuffisants, la Commission autorise l'État en difficulté à prendre les mesures de sauvegarde dont elle définit les conditions et modalités. . . .

<sup>3</sup> Article 67 (2) (ii) provides that the High Authority may, in certain circumstances, authorize a member State to provide assistance for the coal and steel businesses under its jurisdiction. The



French iron and steel industry, including a preferential rediscount rate for exports of iron and steel; according to Article 1 (1) (b) of the Commission's decision, the rediscount rate had to be no lower than 2 per cent, and the gap between the preferential rediscount rate and the normal rediscount rate was not allowed to exceed 3 per cent during the period ending on 31 October 1968, or 1½ per cent between 1 November 1968 and 31 January 1969. The French Government agreed in advance to the terms of this decision. On 23 July 1968 the Commission took a similar decision under Article 108 (3) of the E.E.C. Treaty, applying to products covered by the E.E.C. Treaty.

However, instead of reducing the gap between the preferential rediscount rate and the normal rediscount rate to 1½ per cent on 1 November 1968, as required by the decisions of 6 and 23 July 1968, France retained a rediscount rate of 2 per cent for exports and 5 per cent for domestic transactions. On 5 November 1968 France informed the President of the Commission that the preferential rediscount rate would remain at 2 per cent until 31 December 1968.

The Commission considered that France was in breach of her obligations under the E.E.C. and E.C.S.C. Treaties, and began to take the appropriate action. Article 88 of the E.C.S.C. Treaty provides:

Si la Haute Autorité<sup>1</sup> estime qu'un État a manqué à une des obligations qui lui incombent en vertu du présent traité, elle constate ledit manquement par une décision motivée, après avoir mis cet État en mesure de présenter ses observations. Elle impartit à l'État en cause un délai pour pourvoir à l'exécution de son obligation. . . .

The member State concerned may challenge the High Authority's decision before the Court of Justice of the European Communities. The procedure under Article 169 of the E.E.C. Treaty is different:

Si la Commission estime qu'un État membre a manqué à une des obligations qui lui incombent en vertu du présent traité, elle émet un avis motivé à ce sujet, après avoir mis cet État en mesure de présenter ses observations.

.Si l'État en cause ne se conforme pas à cet avis dans le délai déterminé par la Commission, celle-ci peut saisir la Cour de justice.

Under both Treaties, however, the Commission must, before taking any action, give the member State concerned an opportunity to 'présenter ses observations'.<sup>2</sup> This is what the Commission proceeded to do, on 9 November 1968.

amount, conditions and duration of the assistance are fixed by an agreement between the Commission and the member State concerned. (Since 1967 there has been a single Commission for all three European Communities, which Commission exercises the powers of the former High Authority.)

<sup>1</sup> See preceding note.

<sup>2</sup> This requirement is interpreted very strictly by the Court, which will refuse to hear proceedings instituted under Article 169 unless the Commission, before instituting proceedings, gave the member State concerned an opportunity to 'présenter ses observations' about a breach of the Treaty which is alleged to have occurred in the *past*; it is not enough for the Commission to give a member State an opportunity to 'présenter ses observations' about a breach which the Commission fears will occur in the *future* (*Commission of the European Communities v. Italian Republic*, *Recueil de la jurisprudence*, 16 (1970), pp. 25, 34). Similarly, if the Commission considers that a law in force in a member State constitutes a continuing breach of the Treaty, and if the State concerned alters the law after presenting its observations to the Commission, then the Commission must, before issuing an *avis motivé* and instituting proceedings, give that State a further opportunity to present its observations about the *new* situation created by the alteration of the law (*Commission of the European Communities v. Italian Republic*, *ibid.*, p. 111).

Meanwhile, a fresh balance of payments crisis had occurred in France, and on 12 November 1968 the Banque de France raised the normal rediscount rate to 6 per cent, thus increasing the gap between the preferential rediscount rate and the normal rediscount rate to 4 per cent. On 13 December 1968 France informed the Commission that she could not reduce the gap between the two rates to  $1\frac{1}{2}$  per cent; however, the preferential rate for exports would be increased to 4 per cent on 31 December 1968, thus reducing the gap to 2 per cent.

On 18 December 1968 the Commission issued an *avis motivé* under Article 169 of the E.E.C. Treaty, declaring that France had broken one of its obligations under the Commission's decision of 23 July 1968 by maintaining after 1 November 1968 a gap of more than  $1\frac{1}{2}$  per cent between the preferential rediscount rate for exports to other member States and the normal rediscount rate. The Commission called upon France to rectify the situation within 21 days. Instead of rectifying the situation, France informed the Commission on 26 December 1968 that the rediscount rate for exports would be raised on 1 January 1969 from 2 per cent to 3 per cent (and not to 4 per cent, as France had promised on 13 December 1968), thus producing a gap of 3 per cent between the preferential rediscount rate and the normal rediscount rate. On 31 January 1969 the Commission began proceedings in the Court of Justice of the European Communities, asking the Court to declare that France had broken one of its obligations under the Commission's decision of 23 July 1968 by maintaining after 1 November 1968 a gap of more than  $1\frac{1}{2}$  per cent between the preferential rediscount rate for exports to other member States and the normal rediscount rate.

Meanwhile, the Commission took a decision on 18 December 1968 under Article 88 of the E.C.S.C. Treaty, declaring that France had broken one of its obligations under Article 1 (1) (b) of the Commission's decision of 6 July 1968 by maintaining after 1 November 1968 a gap of more than  $1\frac{1}{2}$  per cent between the rediscount rate for domestic transactions and the preferential rediscount rate for exports of iron and steel to other member States. The decision was communicated to France on 23 December 1968, and the Commission called upon France to rectify the situation within 21 days. France appealed to the Court on 28 February 1969, requesting the Court to annul the decision of 18 December 1968 and to declare that France was legally entitled to maintain a preferential rediscount rate for exports of iron and steel to other member States.

The Court decided both cases in a single judgment.

The Court's judgment dealt first with the case under the E.E.C. Treaty, in which the Commission accused France of violating one of her obligations under the Commission's decision of 23 July 1968. France pleaded that the decision of 23 July 1968 was *ultra vires* the Commission, since monetary policy, including the operation of preferential rediscount rates, lay exclusively within the powers of member States. In normal circumstances France would have been unable to allege any defects in the decision of 23 July 1968, since she had not instituted a *recours en annulation* against that decision within the time limit of two months laid down by Article 173 (3) of the E.E.C. Treaty and the decision had therefore become final. But in view of the special circumstances of the case, the Court decided not to reject the French plea as inadmissible:

que sans contester qu'il a laissé s'écouler ce délai, le gouvernement de la République française . . . affirme cependant que cette décision aurait été prise dans un domaine relevant de la seule compétence des États membres;

que si cette affirmation était fondée, la décision susvisée manquerait de toute base

juridique dans l'ordre communautaire et que dans une procédure où la Commission, dans l'intérêt de la Communauté, poursuit un manquement d'État, c'est une exigence fondamentale de l'ordre juridique que la Cour contrôle si tel est le cas.

The Advocate-General Roemer explained this result by saying that, if the French plea were well founded, the Commission's decision would be, not voidable, but void, so that its nullity could be pleaded at any time.<sup>1</sup>

However, after holding that the French plea was admissible, the Court rejected it on the merits. Although, as a general rule, monetary policy lay within the powers of member States, several provisions of the E.E.C. Treaty restricted the discretion of member States when exercising those powers; consequently,

. . . l'exercice des compétences retenues ne saurait donc permettre de prendre unilatéralement des mesures qu'interdit le traité.

The real question was therefore whether the French preferential rediscount rate was in fact forbidden by the Treaty; and the Court held that it was, because it constituted an *aide* within the meaning of Article 92.<sup>2</sup> Therefore,

. . . une autorisation préalable de la Commission était nécessaire pour instaurer ou maintenir un taux de réescompte préférentiel à l'exportation et . . . en l'assortissant de conditions appropriées la Commission n'a pas empiété sur les compétences retenues des États membres.

Indeed, France herself had recognized that authorization by the Commission was necessary, by applying for such authorization on 12 June 1968.

France also pleaded other defects in the Commission's decision of 23 July 1968, but the Court refused to consider these pleas because they did not affect the Commission's competence to take that decision and did not therefore prevent that decision from becoming final as a result of France's failure to institute a *recours en annulation* against the decision within the time limit specified in Article 173 (3) of the Treaty.

There was, however, one apparent exception to this ruling by the Court. France pleaded that the maintenance after 1 November 1968 of the gap between the preferential rediscount rate for exports and the normal rediscount rate constituted a new emergency measure under Article 109 of the Treaty, justified by the fresh balance of payments crisis which occurred in the autumn of 1968. By treating this allegedly new measure as a mere continuation of the old measures, and by issuing the *avis motivé* of 18 December 1968 without taking account of the change of circumstances, the Commission had, according to the French government, violated Article 109 of the Treaty, which gives the Council of Ministers (not the Commission) the power to decide whether emergency measures taken by a member State shall be modified, suspended or revoked.

The Court held that this plea was not time-barred, because it was based on new facts subsequent to the decision of 23 July 1968. But it nevertheless rejected the plea on the merits, because Article 109 (2) provides that 'la Commission et les autres États membres doivent être informés de ces mesures de sauvegarde au plus tard au moment où elles entrent en vigueur . . .', and the statements made by France to the Commission on 5 November and 13 December 1968 did not seek to justify France's behaviour as a new emergency measure under Article 109.

By deciding that a statement made in accordance with Article 109 (2) and containing an express reference to Article 109 is a condition precedent for the legality of

<sup>1</sup> *Recueil de la jurisprudence*, 15 (1969), p. 552.

<sup>2</sup> See above, p. 248.



action taken under Article 109 (1), the Court may appear to be adopting a very formalistic approach. But, as the Court pointed out, Article 109 authorizes a member State to take unilateral emergency action which derogates from its obligations under the Treaty and which is likely to interfere with the smooth running of the Common Market, so that a strict interpretation is not out of place. Moreover, it becomes very difficult for the Council of Ministers to control a member State's actions under Article 109 (3) if the member State does not say that its actions are based on Article 109.

Finally, France sought to challenge the legality of the *avis motivé* of 18 December 1968. The Court, however, held that France was not entitled to do so:

attendu que cet avis ne constitue qu'une phase précontentieuse d'une procédure aboutissant éventuellement à la saisine de la Cour de justice et que l'appréciation du bien-fondé de cet avis se confond avec celle du bien-fondé du recours lui-même dont la Commission a saisi la Cour de justice en vertu de l'article 169.

Consequently, a defendant State could not base its case solely on the illegality of the *avis motivé*.<sup>1</sup>

The Court therefore decided that France had broken one of her obligations under the Commission's decision of 23 July 1968 by maintaining after 1 November 1968 a gap of more than 1½ per cent between the preferential rediscount rate for exports to other member States and the normal rediscount rate.

The Court then turned to the case under the E.C.S.C. Treaty. Many of the Court's rulings on this case resemble its rulings on the case under the E.E.C. Treaty:<sup>2</sup>

Attendu qu'à l'appui de son recours en annulation le gouvernement français invoque en premier lieu qu'il n'était pas tenu, pour faire bénéficier les exportations de produits sidérurgiques d'un taux de réescompte préférentiel, de solliciter au titre du traité C.E.C.A. l'autorisation que la Commission lui a accordée le 6 juillet 1968 parce que l'avantage octroyé à ces produits était compris dans une mesure générale, non spécifique au secteur C.E.C.A., qui ressortissait dès lors, au regard de ce traité, à la compétence retenue des États;

attendu que la décision du 6 juillet 1968 n'ayant pas fait l'objet dans les délais impartis par l'article 33 du traité d'un recours en annulation, doit être considérée comme définitive;

attendu que les États membres, dans l'exercice de leurs compétences retenues, ne peuvent déroger aux obligations dérivant pour eux des dispositions du traité, que dans les conditions prévues au traité lui-même;

que, notamment, l'article 4 déclare incompatibles avec le marché commun du charbon et de l'acier, les subventions ou aides accordés par les États ou les charges spéciales imposées par eux: 'sous quelque forme que ce soit';

que l'article 67 en prévoyant dans son paragraphe 2, alinéa 2, des situations permettant à la Commission d'autoriser les États membres, par dérogation à l'article 4, à octroyer des aides, ne distingue pas entre les aides spécifiques au secteur du charbon et de l'acier et celles qui s'y appliquent par l'effet d'une mesure générale;

qu'un taux de réescompte préférentiel à l'exportation constitue dès lors une aide qui,

<sup>1</sup> The Commission pointed out (*Recueil de la jurisprudence*, 15 (1969), p. 531) that the *avis motivé* did not impose any fresh obligations on France, but merely called upon France to perform her obligations under the decision of 23 July 1968. By seeking to attack the *avis motivé* of 18 December 1968, France was attempting to evade the consequences of her failure to institute a *recours en annulation* against the decision of 23 July 1968 within the time limit specified in Article 173 (3) of the Treaty. The Court's ruling is based on the same idea as the well-established rule that a *recours en annulation* does not lie against a decision which merely confirms a previous decision.

<sup>2</sup> *Ibid.*, p. 543.

au sens de l'article 67, doit être autorisée par la Commission dans la mesure où elle concerne le secteur du charbon et de l'acier;

...

que la Commission n'a donc pas empiété sur le domaine réservé aux États en agissant auprès du gouvernement de la République française pour lui demander de se conformer aux dispositions du traité et en assortissant sa décision du 6 juillet 1968 de conditions appropriées;

qu'en raison du caractère définitif de cette décision, il n'y a pas lieu de s'arrêter aux autres moyens d'illégalité soulevés contre elle.

France also argued that she was entitled to challenge the legality of the decision of 18 December 1968, 'qui serait affectée des mêmes vices que celle du 6 juillet 1968'. The Court rejected this argument on grounds similar to those which led it to reject the French attempt to challenge the legality of the *avis motivé* issued on 18 December 1968 under Article 169 of the E.E.C. Treaty:

attendu qu'aux termes de l'article 88, la décision dont s'agit a pour unique objet de constater le manquement par un État à une obligation préexistante et de lui impartir un dernier délai pour le faire cesser;

que cette décision n'a pas, en l'espèce, créé à la charge de l'État, d'autres obligations que celles auxquelles il était précédemment tenu;

que si l'État, à qui un manquement a été reproché, est en droit de contester, au cours de la procédure de l'article 88, les modalités nouvelles d'exécution que la décision lui aurait imposées, cette faculté ne saurait aboutir à rouvrir, hors délai du recours en annulation, le débat sur la légalité de la mesure à laquelle l'État s'est soustrait;

que les griefs articulés contre la décision du 18 décembre 1968 sont identiques en tous points à ceux formulés contre la décision du 6 juillet 1968 dont celle du 18 décembre ne fait qu'assurer l'exécution;

que ces moyens doivent dès lors être écartés comme irrecevables.

Finally, France based an argument on Article 67 (2) (ii) of the E.C.S.C. Treaty:

attendu qu'à titre subsidiaire le gouvernement français fait encore valoir qu'aux termes de l'article 67, paragraphe 2, alinéa 2, du traité, le montant, les conditions et la durée des aides autorisées par la Commission doivent être fixés par cette dernière en accord avec l'État intéressé et que, même s'il avait donné son accord à la décision du 6 juillet 1968, un fait nouveau serait intervenu en octobre 1968 sous forme d'une nouvelle crise monétaire;

qu'il aurait fait savoir les 5 novembre et 13 décembre 1968 que ces circonstances nouvelles l'amenaient à ne pas réduire l'écart entre les taux de réescompte et qu'il aurait ainsi retiré l'accord qu'il avait précédemment donné.

France was, in effect, invoking the *rebus sic stantibus* doctrine. But the Court held that this doctrine was irrelevant as regards agreements concluded under Article 67 (2) (ii) of the E.C.S.C. Treaty:

attendu qu'*indépendamment de la question du degré de gravité de ces circonstances*, il ne résulterait pas pour autant de leur survenance que les conditions de l'autorisation accordée le 6 juillet 1968 auraient été frappées de caducité ou que l'État intéressé aurait pu se dégager unilatéralement des obligations qu'il avait acceptés;

que, *dans le cadre du seul traité C.E.C.A.*, ces circonstances ne pouvaient justifier, de la part du gouvernement français, qu'une demande en révision de la décision du 6 juillet 1968;

que ce gouvernement n'ayant pas recouru à cette possibilité, le retrait de son accord n'aurait eu d'autre effet que de mettre fin à la faculté d'octroyer des aides [*italics added*].

The Court therefore rejected France's appeal against the Commission's decision of 18 December 1968.

MICHAEL AKEHURST





## REVIEWS OF BOOKS

*Asian-African Legal Consultative Committee. Report of the Ninth Session held in New Delhi, 1967. New Delhi: Published by the Secretariat. No date. Items separately paginated. No price stated.*

This volume contains the following items of substance: an interim report on the Draft Articles on the Law of Treaties adopted by the International Law Commission at its eighteenth session; preliminary statements by delegates on the law of international rivers; and Reports and background materials concerning the *South-West Africa* cases (Second Phase) and relief against taxation (including fiscal evasion). The bulk of the material in the volume is devoted to the last two items. The section on the *South-West Africa* cases contains a study prepared by the Secretariat, the final chapter of which deals with the 'question of restoring confidence in the International Court of Justice'. This chapter makes measured criticisms of the composition of the Court in terms of the representation of major legal systems and forms of civilization and raises the question of enlargement of the Court as a means of reform. The significance of this material at the present juncture scarcely needs stressing although the reviewer feels that 'the problems concerning the role of the Court' stem in the long term from a failure on the part of both the political world and some lawyers to see the international judicial function in a proper perspective.

IAN BROWNLIE

*La Décision dans les Communautés européennes. Brussels: Université de Bruxelles, Institut d'études européennes, 1969. 508 pp. BFr. 840.*

In 1966 the Association for the Development of European Political Science held a conference of lawyers, political scientists, economists, sociologists and historians on the subject of the decision-making process in the European Communities; this book contains thirty-one papers delivered at the conference, revised in the light of these discussions.

The first part analyses the role played by the different institutions of the Communities in the decision-making process. The second concerns the preparation, in each of the member States, of their positions prior to the adoption of decisions. This is followed by an interesting collection of case-studies, which demonstrate how the process of arriving at decisions varies according to the nature of the problems involved. The last, most ambitious, part attempts an evaluation and includes an engrossing study by Professor Maurice Flory of the 'point of no return' in the process of creating a federation.

The contributions are of a high standard, though even for an interdisciplinary study there is little material of purely legal interest. What particularly struck this writer was the considerable irrelevance of traditional international law; though integration is far from complete, the problems of the Communities are in many respects more akin to those of federal systems than those of the generality of international organizations. For international law to be gradually transmuted into municipal law in such cases is perhaps one of its greatest achievements.

MAURICE MENDELSON

*European Convention on Human Rights: Collected Texts.* 6th edition. Strasbourg, 1969. Items separately paginated. No price stated.

This collection is divided into separate sections and lacks both continuous pagination and an index. Nevertheless, it is obviously a publication of the utmost utility. The materials concern the period ending in October 1969 and are reproduced in English and French. The sections are disposed as follows: the Convention and its five Protocols; the Rules of Procedure of the European Commission; the Rules of Court of the European Court; the Rules of Procedure adopted by the Committee of Ministers for the application of Article 32 of the Convention; ratifications, declarations and reservations; lists of members of the Commission and the Court; the Second and Fourth Protocols to the General Agreement on Privileges and Immunities of the Council of Europe (provisions concerning the Commission and the Court); and the European Agreement relating to persons participating in proceedings of the European Commission and Court of Human Rights. The reservations to the Convention and the First and Fourth Protocols, conveniently set out together in this volume, are of particular interest.

IAN BROWNLIE

*The International Monetary Fund 1945-1965. Twenty Years of International Monetary Cooperation.* Vol. I: *Chronicle*, xviii+663 pp. Vol. II: *Analysis*, xviii+621 pp. Vol. III: *Documents*, vii+549 pp. Washington, D.C.: International Monetary Fund, 1969. \$12.50 for the set of three volumes.

The International Monetary Fund is an international organization which, in a wholly praiseworthy manner, has always provided those interested in its activities with a remarkable measure of information and publicity. Thus the *Staff Papers* issued under its auspices have become an established source of enlightenment on financial and, to some extent, legal aspects. In the circumstances it is not surprising and, at the same time, it is most welcome that the Fund has now published three imposing and, indeed, massive volumes on the first twenty years of its existence. (They are, unfortunately, so massive that it is difficult for some and inconvenient for all to hold a volume for any length of time.) Historians, economists and financial experts will be the principal beneficiaries, but there is also a certain amount of material which is likely to throw light on legal points. It is, accordingly, by no means inappropriate to notice the three volumes in this *Year Book*.

The first volume, written by J. Keith Horsefield and entitled *Chronicle*, contains a description of the historical development in chronological order. It begins with the Keynes and White Plans (1941-2), traces the outstanding events in each subsequent year and ends with two chapters on the period 1963-5. By way of appendix a chapter called 'The Wood and the Trees' adds a summary, and in a final chapter the author looks at the period 1966-8. This supplementary chapter is a fitting conclusion, for, although it relates to a period outside the author's assignment, it establishes the link with a new phase and with new problems.

Volume II contains the analysis which is largely excluded from the first volume. Hence the second volume is much more readable. It comprises twenty-seven chapters most of which are written by Mrs. Margaret G. de Vries, a member of the Fund's

staff from 1946 to 1959, but there are also some contributions by Mary H. Gumbert, J. Keith Horsefield, Gertrud Lovasy, Emil G. Spitzer and, as lawyers will note with particular satisfaction, Joseph Gold, the indefatigable Director of the Fund's Legal Department, who has done more than anyone else to familiarize the legal world with the legal problems of the Fund, its structure and its organization. To the present volume he has contributed the fifth part headed 'Constitutional Development and Change' and comprising six chapters on the Institution; the Use of Fund's Resources; the Code of Conduct; the Techniques of Response; Some Characteristics of Operation; and the Amendments (pp. 513-605).

Volume III, edited by J. Keith Horsefield, presents all the documentary material, beginning with the Keynes Plan, continuing with the unamended text of the Articles of Agreement and other basic documents such as the Executive Directors' Selected Decisions, proceeding with Fund Pronouncements on a large number of financial issues, and ending with a part relating to the period after 1965 during which, in particular, the Articles of Agreement were to be amended, primarily to provide for Special Drawing Rights.

As has already been indicated, the first and second volumes are full of information which specialist lawyers will find fascinating. Within the framework of the present review it will only be possible to mention a few examples.

In view of discussions which from time to time have been raised and which were renewed in 1969 in connection with the revaluation of the German currency, it should be noted that in September 1949 the Legal Department of the Fund had rendered the advice (the correctness of which is, and ought generally to be accepted as, indubitable) that 'the Fund had no power to approve the adoption of a fluctuating rate as a transition from one agreed parity to another' (Volume I, 272). In 1951 the Fund itself made a statement to the same effect (Volume I, 274).

Volume I also contains a detailed description of the circumstances in which Czechoslovakia left the Fund (pp. 359 et seq.). The essential facts have frequently been stated, but attention is drawn here to the incident on account of the astounding sequel to which it led in France. An action was brought under a contract made in 1948 in Czechoslovakia and involving Czechoslovakian currency. The defendant invoked Article VIII, Section 2 (b) of the Fund Agreement. The Court of Appeal at Aix-en-Provence held that Czechoslovakia had never been a member of the Fund. The Cour de Cassation treated this as a finding of fact which was binding upon it (16 October 1967, *Bull. Cass. Civ.* 1967, no. 296).

From a strictly legal point of view Mr. Gold's contribution is particularly important. He presents a balanced and interesting picture of certain legal aspects of the Fund's constitution. His emphasis on the virtue of flexibility and vagueness in the case of an international text such as the Articles of Agreement will not come as a surprise to those who are familiar with Mr. Gold's writings or, indeed, with the life of international institutions. There may be no cause for hesitation where States only are involved. When international constitutions affect private persons, different considerations may arise. There is room for doubt whether the Fund in general and Mr. Gold in particular have been sufficiently alive to the risks and inconvenience to which flexibility and vagueness are liable to expose members of the public.

It is for this reason that it will, perhaps, be permitted to revert again, by way of example, to the question of the definition of 'exchange restrictions', which Mr. Gold discusses at p. 554 and in respect of which the Fund has confined itself to stating the 'guiding principle' inherent in the question whether the restriction 'involves a direct governmental limitation on the availability or use of exchange as such'. As the present



reviewer has pointed out more than once, such a definition could, but is not intended to, comprise a system of exchange control. This system, with its provisions for application to governmental authorities, completion of forms, submission of evidence and so forth, is not, however condemned by the Fund at all. It is the purely factual restriction or hindrance, the refusal of a permission applied for in accordance with regulations, that the Articles of Agreement would seem to contemplate when they speak of restriction on payments and that the Fund has in mind when it speaks of 'direct governmental limitation'.

On pp. 592 et seq. Mr. Gold discusses the idea of reciprocity in the application of Article VIII, Section 2 (*b*) and rejects the suggestion that, where an exchange contract is alleged to be unenforceable on account of its inconsistency with the exchange control regulations of another member, it should be relevant to inquire whether that member 'was applying Art. VIII, Section 2 (*b*) or other provisions of the Articles'. As Mr. Gold puts it (p. 592):

The purpose of the Articles is to preserve legal order notwithstanding failures by a member from time to time to fulfil any of its obligations under the Articles. It is the function of the Fund to decide whether there has been a failure and what the legal consequences shall be. Even if the Fund is satisfied that there has been a failure, it does not follow that the legal consequences will be the release of other members from any of their obligations in relation to the defaulter or other members.

Article VIII, Section 1, imposes 'the obligations set out in this Article' upon 'each member'. Article VIII, Section 2 (*b*), operates only where the exchange control regulations of the member in question are 'maintained . . . consistently with this Agreement'. If a member fails to make exchange available for payments to whites, or Dutchmen or Jews, can it really be suggested that a court must give effect to the unenforceability of exchange contracts arising under that member's exchange control regulations? Does the Fund really claim the monopoly of decision whether the regulations are maintained consistently with the Agreement?

Enough has been said to indicate that this is a most valuable work which is reasonably priced and should be of great benefit to any student of the life and work of international institutions.

F. A. MANN

*Manual of the Council of Europe.* By a group of officials of the Secretariat. London: Stevens & Sons Ltd. 1970. 322 pp. £5.50.

This manual, which to a large extent is a development of Robertson's *The Council of Europe*, tells the familiar story of the inception and progress of the Council. The disappointment in 1949 at the absence of supranationalist features in its constitution, the unsuccessful attempt by a spirited Consultative Assembly to make the Council 'a political authority with limited functions but real powers', the general lack of enthusiasm of the Committee of Ministers, and the Council's no more than peripheral role in the economic integration of Europe—these less fortunate sides of the Council's history are all recorded. But so, also, are the more successful parts of its work. In particular, the chapter summarizing the legal activities of the Council confirms its achievements in furthering international co-operation in areas of political calm. The *European Treaty*

*Series*, for example, bears witness to an impressive level of productivity and contains a number of important agreements that are in force. The European Convention on Establishment of 1955, which is the first multilateral convention to enter into force in this area, and the European Convention for the Peaceful Settlement of Disputes of 1957, which was followed by the parties to the *North Sea Continental Shelf* cases when those cases were referred to the International Court of Justice, are examples. So also is the European Convention on Human Rights, to which a separate chapter is devoted. The system for the protection of human rights which was established by the last of these probably represents the Council's most instructive step in furthering the objective set for it in its Statute of achieving 'a greater unity between its Members'. It both contains the beginnings of a European Bill of Rights and also demonstrates in some areas the problems involved in achieving legal unification where common law and civil law systems are present (witness the ruling in the *Neumeister* case on pre-trial detention pending trial). In the same connection it might be mentioned that the *Greek* case, which has dominated activities within the Council recently, and which posed for it the question facing many international institutions of the value of excluding a recalcitrant Member, came to the boil after the *Manual* had been prepared.

The *Manual* is not intended as a critique of the Council's achievements (cf. the foreword) and accordingly has little critical comment upon them. Nor does it contain any prognosis of the Council's future. As an account of how the Council works and what it has done in its first twenty years, however, it will be very useful.

D. J. HARRIS

*Recueil d'études de droit international en hommage à Paul Guggenheim.* Geneva: *Faculté de droit de l'université* and *Institut universitaire de hautes études internationales*, 1968. xxxii+901 pp. £10.50.

Paul Guggenheim stands alongside such men as Charles De Visscher, McNair, Hersch Lauterpacht, Bourquin and Basdevant as one of the leading international lawyers in Europe in the middle period of this century, who have made their mark no less in the practice than in the study of the law. A distinguished teacher and writer of international law all his working life, in his later years he gained a growing reputation and authority both as Counsel and Judge. Cases in which he appeared as Counsel have included the *Interhandel*, *Right of Passage*, *Arbitral Award of the King of Spain* and *Barcelona Traction Company* cases before the International Court and the *Belgian Linguistics* cases before the European Court of Human Rights. As judge, he has been president of several Conciliation Commissions and a member of arbitral tribunals, while he has served on the Bench of the International Court as Judge *ad hoc* in the *Nottebohm* case. Amongst his other international appointments may be mentioned his employment by the United Nations as one of the experts to assist in drawing up a constitution for Eritrea. No less significant were the tasks entrusted to him by his own country: a member of the commissions set up successively by the Swiss Government to report on Switzerland's relations with the United Nations and on her adherence to the Statute of the International Court, he was also head of the Swiss delegation for negotiating the 'headquarters agreement' between Switzerland and the International Labour Organization, as well as the legal member of her delegation in the negotiations for Switzerland's participation in C.E.R.N. This by no means exhausts the capacities

in which Paul Guggenheim has advanced the cause of international law, not the least of the others being his services to the Institute of International Law both as member and as Treasurer.

It is Paul Guggenheim's forty years of teaching, almost all in Geneva either at the Institut de hautes études internationales or at the University, and entirely devoted to public international law, which the present volume primarily celebrates. Forty-two learned articles on public international law topics, contributed by former pupils and by colleagues or friends, are here collected together and published under the joint auspices of the Law Faculty of the University and the Institut de hautes études internationales; twenty-four are in French, nine in English and nine in German. The articles are arranged in five parts, having the following headings: (1) *histoire du droit des gens*; (2) *fondement et sources du droit international*; (3) *rapports entre le droit international et le droit interne*; (4) *justice internationale*; and (5) *varia*. They run to some 895 pages of text and constitute a truly monumental tribute to the jurist whom it is their purpose to honour.

Part I, the historical part, contains four substantial essays, one of which concerns an episode in the neutrality of Switzerland, 'Le projet d'alliance entre la Confédération suisse et le Royaume de Sardaigne en 1848', by M. Batelli, and another the beginning of the neutrality of Austria, 'Die Anfänge der Neutralität der Republik Österreich, 1919-22', by S. Verosta. A third traces in detail the story of the first case of recognition of the belligerency of insurgents in Europe, 'La première application en Europe de la reconnaissance de belligérence pendant la guerre d'indépendance', by C. Th. Eustathiades. The remaining essay contains an illuminating discussion of recurring controversies between Czarist Russia, on the one hand, and a number of European powers and the United States, on the other, concerning the treatment of foreign Jews in Russia during the nineteenth century and up to the First World War. ('The National Treatment Clause in Historical Perspective', by N. Feinberg). Each one of these essays, although historical, has its interest for lawyers of today.

The second part comprises no less than nineteen essays dealing with topics which fall within the broad rubric of the 'foundations and sources of international law'. Two are of a general character, namely reflections on sovereignty by Rudolf Bindschedler and the role of theory in international law by Fritz Munch. Three of the essays discuss in different connections the codification of international law. R. Ago, in his 'La Codification du droit international et les problèmes de sa réalisation', stresses the importance of codification in the new enlarged international community of today, and makes a strongly reasoned plea for the United Nations to intensify its efforts and strengthen its procedures for promoting the ratification of codifying conventions, a question which he has also raised in the International Law Commission. Suzanne Bastid, in her 'Observations sur une "étape" dans le développement progressif et la codification des principes du droit international', brings under sharp focus the legal processes underlying the task entrusted to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, and seeks, in particular, to determine precisely what is involved in the Assembly's intention, expressed in Resolution 1815 (XVII), to adopt a declaration regarding principles drawn up by the Committee which would mark 'une étape dans le développement progressif et la codification de ces principes'. She concludes that the prime effect of this type of General Assembly resolution purporting to declare principles of international law is to create an estoppel for the States participating in its adoption which precludes them from afterwards maintaining that the principles of customary law governing the matter are in truth something other than the principles endorsed in the resolution. In the 'Effects of



Ill-conceived Codification and Development of International Law' R. Baxter uses the abortive efforts to codify the Nuremberg Principles, 'offences against the peace and security of mankind' and the law of 'aggression' as a text for warning us against premature or hasty attempts at codification in international law, the ultimate result of which, he stresses, may be the very destruction of the law in question. The effect of declarations of general principles of international law by the General Assembly, discussed in Suzanne Bastid's essay, is taken up in a more general way by M. Virally in his 'Le rôle des "principes" dans le développement du droit international'. He distinguishes between a principle derived from existing positive law and a principle derived from a conceptual postulate. As to the latter, he does not consider that the consensus expressed in a General Assembly declaration suffices to establish the principle as customary law, although the declaration may be considered a 'precedent'. The abstract character of the postulate on which the declaration is based, in his view, necessarily makes the principle no more than an inchoate rule of law which needs to be made concrete in the practice of individual States before it can acquire the character of a fully fledged rule of international law.

The general principles of law recognized by States whose application is authorised in paragraph 1 (c) of Article 38 of the Statute of the Court are the subject of three essays. A. Blondel, in what may be said to be an orthodox account of this 'source' of international law, supplies a wealth of illustrations of recourse to it from the jurisprudence of both the Permanent Court of International Justice and the present Court. A. Verdross, whose basic thesis that this source embodies the principles of 'natural law' has been expressed elsewhere,<sup>1</sup> here addresses himself primarily to the domains in which the general principles of law mentioned in paragraph 1 (c) may be found. While excluding both treaties and custom as generators of these principles, he insists that they need not be looked for exclusively in concordant rules of internal law; and he suggests that they may and do have their genesis in declarations of principle by the General Assembly. Furthermore, in sharp contrast with the view of M. Virally mentioned above, he considers that a 'general principle of law' comes into being immediately upon its recognition by States within the General Assembly or, indeed, outside it. Finally, A. Favre's basic approach to the question is not far removed from that of Verdross. While recalling that the draftsmen of paragraph 1 (c) of Article 38 of the Statute undoubtedly had in mind general principles received by States in their internal law, he says that the Court has not hesitated to give a broader content to that paragraph and to make positive concepts of morality and requirements of humanity. It is in the idea of justice that he finds the explanation of the force of general principles of law and the basis of their universal relevance; and he maintains that these principles, because they are an expression of justice, do not, as Professor Tunkin teaches, rest upon the consent of States, and are equally valid for 'socialist' and 'capitalist' systems.

Two further essays deal with a topic which may perhaps be considered as a particular aspect of the general principles of law recognized by States whose application is directed by paragraph 1 (c) of Article 38 of the Statute: namely, the conduct of States as a source of international rights and obligations independently of treaty and custom. P. Cahier, who prefers to treat unilateral acts or omissions as an independent source not specifically covered by the provisions of Article 38, discusses their legal implications in various contexts, effective occupation, maritime claims, renunciation, modification of a treaty, notification, protest, inaction, tacit acquiescence, prescription. He distinguishes the cases with which he deals from cases of estoppel, which he says are not cases of the

<sup>1</sup> See *Recueil des cours* (1935-II), pp. 204-6; *Revue générale de droit international public* (1938), pp. 44-52.

creation of rights or obligations by conduct but rather cases of an impossibility, within the framework of a given procedure, of invoking already existing rights. Among points which he emphasizes are that, where rights or obligations result from unilateral conduct, a State may find itself committed by the act or omission of an organ not normally considered in international law as having authority to bind it; that the State's knowledge of the matter in question is legally a necessary element in the creation of the right or obligation but more often than not is presumed rather than actual; and that it is not the will of the State which is the basis of the right or obligation in these cases, but the need for security in international relations. Finally, he expresses the fear that too facile a reliance by tribunals on presumptions drawn from unilateral conduct and not based on the actual will of States may disincline them to submit to judicial settlement and in that way frustrate rather than promote the objective of security in international relations. For this reason he considers it essential that efforts should be made to establish precise criteria for determining exactly when and under what conditions rights or obligations arise from unilateral conduct.<sup>1</sup> C. Dominicé, in contrast, both makes the principle of 'estoppel' the focus of his examination of the legal implications of unilateral conduct and treats it as falling under paragraph 1 (c) of Article 38. But he too distinguishes 'estoppel' from other types of case where unilateral acts or omissions may generate a right or obligation. In other types of case the legal effects of the conduct, he says, follow from the application of specific principles of international law such as tacit agreement, renunciation, State activity as proof of effective occupation and subsequent practice as an element in the interpretation of treaties; but 'estoppel' is an autonomous principle which in certain cases attaches its own consequences to a State's unilateral conduct. The distinguishing features, according to him, are those found in the English doctrine of estoppel and in the *Barcelona Traction Company* case (Preliminary Objections),<sup>2</sup> namely, a representation by one State to another and prejudice to the other State by reason of its having relied on the representation. Cases of estoppel, he maintains, are not properly speaking concerned with a substantive right or obligation, but rather with a procedural rule negating the admissibility of a contention.

Four essays are devoted to the law of treaties. In one, Judge M. Lachs gives his reflections on selected aspects of the International Law Commission's draft Convention. The second, by J. Dehaussy, examines the question of the classification of treaties as it manifested itself in the Commission's draft; the author concludes that, although not wholly satisfying from a doctrinal point of view, the Commission's pragmatic and relatively simple treatment of the differences in the kinds of treaties was justified in order to make the acceptance of the draft Convention by States as easy as possible. The third, by A. N. Makarov, discusses the special problem of the interpretation of plurilingual treaties, taking as its text the Commission's draft article on this matter (Article 29 in its final report).<sup>3</sup> In the fourth, A. Cassese makes a close study of the new form of reservations clause contained in Article 20 of the Convention on the Elimination of All Forms of Racial Discrimination. This clause excludes both reservations incompatible with the object and purpose of the Convention and reservations which would inhibit the operation of any of the bodies established by the Convention; it also provides that a reservation shall be considered as incompatible or inhibitive if at least two-thirds of the parties object to it, and fixes a period of ninety days for the lodging of

<sup>1</sup> Unilateral acts is one of the topics which have been suggested by members of the International Law Commission for inclusion in its future programme of work; see A/C. N. 4/230 (1970), p. 58.

<sup>2</sup> *I.C.J. Reports*, 1964, at p. 24.

<sup>3</sup> Cf. J. Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals'; this *Year Book*, 37 (1961), pp. 72 et seq.



objections. A. Cassese's shrewd analysis of the technical aspects of the clause underlines the difficulties to which the use of a 'collegiate' system of this type for policing the making of reservations may give rise.

The law of treaties is also the main focus of two other essays. In a study of retroactivity in international law Denise Bindschedler-Robert points out that the principle of non-retroactivity is really inherent in the very nature of the development of customary law. As to treaties, she stresses the need to distinguish between the retroactive operation of a treaty in the sense simply of its application to past situations and the retroactive operation of the norms of the treaty themselves, so as to make them determine the obligations of the parties at a time prior to the treaty. As examples of the former she gives provisions for restitution in a peace treaty or provisions regarding social security or double taxation which are expressed to cover certain past cases; as an example of the latter she gives the treaty of Washington of 1871 laying down rules to determine the past obligations of the parties to the Alabama arbitration. The essay ends with a warning to international judges to avoid judgments, instanced by the *Nottebohm*<sup>1</sup> case, which, rather than interpreting the law, lay down new rules and thus alter retroactively the obligations of the parties. Respect for the principle of non-retroactivity by the international judiciary is, she urges, an essential condition for the development of the jurisdiction of international tribunals. Krystyna Marek, writing of *jus cogens* in international law, emphasizes the 'autonomous' character of this notion as a principle which has relevance solely in regard to States' freedom of contract, and frowns upon the tendency in some quarters to treat the notion of *jus cogens* as relevant for any and every kind of act of State. Every act of a State must be in conformity with its international obligations, whether *jus cogens* or not; and it is only in regard to the limits upon the freedom of States to determine the *content* of their contractual obligations that *jus cogens* assumes significance. After a penetrating analysis of the difficulties which surround the notion of *jus cogens* in international law, Professor Marek concludes that the basic problem is that of the authentic identification of rules of *jus cogens*, that without such authentic identification the dangers are greater than the advantages, and that the solution lies in the greater institutionalization of international law so as to distinguish more sharply between legislation and contract and to introduce compulsory adjudication for determining questions of *jus cogens*. On the last point, at least, the Vienna Conference on the Law of Treaties has shown a marked advance in the attitude of States in the direction advocated by Professor Marek.

H. Mosler contributes an interesting essay on national repertoires of the practice of individual States on questions of international law as a source from which to deduce general international law. The remaining essay in Part 2 is by K. Skubiszewski, and has the arresting title: 'A New Source of the Law of Nations—Resolutions of International Organisations.' As readers of the *Year Book*<sup>2</sup> will be aware, K. Skubiszewski adopts a strict definition of law-making resolutions, limiting them to *decisions* binding members generally and laying down general and abstract rules for their conduct. The essay does not, therefore, deal with the more general problem of resolutions of international organizations as a possible 'source' of international law.<sup>3</sup> Binding resolutions laying down general rules the author considers to be true international legislation and, though recognizing that they derive their authority expressly or by implication from the constituent treaty, regards them as an independent source of international law, a view shared by the present reviewer.<sup>4</sup> If these resolutions can properly be subsumed under

<sup>1</sup> *I.C.J. Reports*, 1953, p. 8.

<sup>2</sup> 41 (1965-6), pp. 198-274.

<sup>3</sup> See J. Castañeda, *Legal Effects of United Nations Resolutions*.

<sup>4</sup> *Recueil des cours*, 106 (1962-II), pp. 96-103.



paragraph 1 (a) of Article 38 of the Statute of the Court, it now seems legitimate to treat them as an autonomous 'source' of international law.

Part 3 consists of three essays on the relation between international law and internal law. The first, by E. Hambro, gives an interesting account of an amendment of the Norwegian Constitution authorizing Parliament, by a three-quarters majority, to 'consent that an international organization<sup>1</sup> of which Norway is or may become a member, shall have the right, within a functionally limited field, to exercise powers which, in accordance with this Constitution, are normally vested in the Norwegian authorities, exclusive of the power to alter this Constitution'. By the adoption of this amendment the views of those who considered that the concept of Norwegian sovereignty in the Constitution must today take account of developments in international collaboration prevailed, and the author emphasizes that the real intention of the amendment is to open the way for Norway's membership in organizations of a supranational character. The second essay, by E. Menzel, discusses the complex problem of the constitutional rank of the norms of the European Convention on Human Rights in the law of the Federal Republic of Germany. In the third Paul De Visscher examines the analogous problem in Belgian law today of the conflict between a treaty and a law. Clearly, if the classical principle that a later law prevails over an earlier one is followed, there is a possibility of the violation of an international obligation through the application of an enactment found to be incompatible with a prior treaty, e.g. with the European Convention on Human Rights. While concurring in the desirability of an express constitutional amendment making the treaty prevail over the law, Professor De Visscher doubts the feasibility of such an amendment in the present state of the linguistic problem in Belgium. In consequence, he explores the powers of the Cour de Cassation as an alternative means of achieving the same result.

International justice forms the subject of the eight essays collected in Part 4, three of which are devoted to acceptance of international jurisdiction. In the first, R. Bernhard discusses the principle of reciprocity in international jurisdiction, while in the second H. W. Briggs makes a close analysis of the several elements of the Optional Protocols which accompany the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and on Consular Relations. Professor Briggs points out, as does also P. Ruegger in an essay on 'Clauses arbitrales et de juridiction dans les conventions internationales récentes', that the Optional Protocols owe much to the 'model clause' endorsed by the Institut de Droit International in 1956 for which Professor Guggenheim was himself the Rapporteur. E. Lauterpacht, on the other hand, turns to a more specialized form of international jurisdiction in his perceptive review of some of the main features of the World Bank Convention on the Settlement of Investment Disputes between States and the Nationals of other States. Among the matters stressed in this essay are the thorny problem of what the author refers to as the 'substantive proper law' to be applied by the Tribunal and the status of the individual as a direct subject of international rights in cases brought before it. Another and very different form of special tribunal is discussed in P. Reuter's essay 'La Cour de justice des Communautés européennes et le droit international'. The author there throws into sharp focus the main areas of contact between the law of the Communities and international law, and he explains the positions taken up by the Communities Court on several highly significant and complex problems of the relation between the legal order of the Communities and the international obligations of member States. Amongst other things he stresses the use made by the Court of the principle of effectiveness in developing

<sup>1</sup> The amendment specifies that the authorization does not apply to 'organisations the decisions of which are not binding on Norway except as obligations under international law'.

the concept of the legal order of the Communities. This principle is also discussed in another essay 'La recherche de l'effectivité dans les principales orientations de la jurisprudence internationale' by Charles De Visscher, which will already be familiar to readers of this *Year Book* as the two final chapters of his recent book on effectiveness in international law. The application of law, including private law and private international law, by international tribunals is the subject of a substantial essay by A. F. Schnitzer, who argues against a narrow view being taken of the powers of international tribunals in this regard. The remaining essay in this part is one of some historical interest by H. Thévenaz on the Swiss jurist C. E. Lardy's contribution to international arbitration. The interest lies in the fact that Lardy was President of the *Ottoman Debts Tribunal*, sole Arbitrator in the *Island of Timor* case, a member of the Tribunal in the *Religious Properties* case and legal adviser of the Swiss Federal Council in the Boundary Arbitration of 1922 between Colombia and Venezuela.

The fifth and last part contains eight papers on miscellaneous topics. J. Andrassy reviews the problem of United Nations operations for the maintenance of peace and the respective roles of the Security Council and General Assembly. J. P. A. François then gives us his reflections on the notion of 'occupation' in the different contexts of the law of territory, of the sea, of airspace and outer-space and finally of celestial bodies. In a short paper entitled 'The United Nations Covenants on Human Rights Come to Life', C. W. Jenks makes a general appreciation of the significance of the General Assembly's adoption of the two Human Rights Covenants. *Inter alia*, he stresses that much remains to be done to make the provisions of the Covenants fully effective, and that there may be scope for far-reaching further international action to achieve their objects. The concept of 'supranationality' in the context of the European Communities is the subject of a paper by G. Leibholz. The European Communities is also used by A. Malintoppi as a yardstick by which to test his thesis regarding the difference between the notion of 'organization' in international law and in internal law. In the latter, according to him, the notion of organization is dominated by the presence of the State itself and its power to determine the conditions of the internal legal order; in the former, on the other hand, it is dominated by the decentralized character of the international system where the State is in no such position in regard to the legal order. The European Communities provides the theme for yet a third paper, a study of the impact of public opinion in international relations by R. Monaco, entitled 'Le rôle de l'opinion publique dans la construction européenne'.

The penultimate paper—by G. Perrin—is devoted to a point of substantive law: the conditions for the validity of nationality in international law. In the first half of the paper the author examines with some thoroughness the general position in international law in regard to the validity of nationality apart from the *Nottebohm* case, and in the second considers how far that position is modified by the Court's judgment in that case. He aligns himself with the critics of the 'effective link' principle enunciated by the Court which he regards as a most unfortunate innovation:

Un coup sensible serait porté à la défense des droits de l'individu dans l'ordre juridique international. Or des obstacles en nombre suffisant s'opposent déjà en droit positif à l'exercice de la protection diplomatique, les moins redoutables n'étant pas la nécessité et dû consentement de l'état défendeur à toute procédure de règlement pacifique des différends et de l'épuisement des voies de recours internes. Sur ce chemin hérissé de difficultés, il serait bien inopportun d'ajouter le piège supplémentaire que représenterait le caractère incertain de la nationalité.

The volume then concludes with a study of the significance for international law of the ideological conflict between the Marxist-Leninist and bourgeois systems, the writer



being the former Soviet member of the International Law Commission, G. I. Tunkin. *Inter alia*, he underlines the point that the ideological conflict may entail differences of outlook not merely in regard to the desirable rule of law but also in regard to the content of a legal concept common to both systems: e.g. 'justice', 'social progress' and 'democratic institutions'. His conclusion is of particular interest. Since the content of a rule of international law is a reflection of an agreement between the subjects of international law, it cannot have as its basis the notion either of the Marxist-Leninist or of the bourgeois ideology. But, he says, alongside the differing Marxist-Leninist and bourgeois notions of such concepts as 'justice' and 'democracy' there exists a *general* notion which is the expression of 'la conscience générale de l'humanité contemporaine'; and it is this general notion which constitutes the content of the international rule. Here we seem to come close to the 'general principles of law recognised by civilised nations'. Moreover—and happily for the future of international law—he also underlines that rules closely linked to ideological notions are comparatively rare in international law.

There can be few memorial volumes which contain so many papers of so much substance and merit; and Paul Guggenheim may justifiably feel proud that his work for international law should have evoked so notable a tribute.

C. H. M. WALDOCK

*Les Télécommunications par satellites—Aspects juridiques. Centre national de la recherche scientifique: Groupe de travail sur le droit de l'espace.* Preface by C.-A. Collard and A.-Ch. Kiss. Paris: Éditions Cujas, 1968. xii+456 pp. £5.35.

No doubt one might have expected that a collection of pieces on satellite telecommunications commissioned by an official French research institute and written by a group of French authors (with one exception) would turn out to be a comprehensive denunciation of the system established under the Washington Agreements of 1964 and 1965 (the INTELSAT Agreements); but, by the same token, one would have hoped that this aim could have been achieved with greater finesse, with less repetition, and with more of an attempt to be seriously *juridique*.

The INTELSAT Agreements were, after all, not intended to last longer than five years. Whether or not they were defensible at the time as a short-term solution to the problem of the moment, little attempt is made now to propound them as the pattern for the future. Reports to date of the negotiations currently under way for their replacement demonstrate how strong and widespread an opposition there is to the existing structure of the international consortium. As a result, one can still hope that it will come home to the vested U.S. commercial interests that substantial changes will have to be made if there is to be any hope of reaching agreement—and certainly if there is to be any hope of agreeing on a set of arrangements capable of lasting longer than a second interim period. Recent press reports suggest that official U.S. circles recognize the need for change.

The defects of the existing INTELSAT system can, without much difficulty, be set out concisely and unemotionally, and in a way that demonstrates, rather than assumes, the eventual conclusion. In the work under review, the reader will find this task elegantly accomplished in a somewhat unlikely place, a (wholly admirable) article on 'La Coopération européenne' by Michel Bourelly, the Legal Adviser to E.L.D.O. It



would be a pity if readers coming fresh to this subject were put off by the manner in which the argument is presented in some of the other articles, for the criticisms of the INTELSAT system voiced by M. Bourelly are very compelling indeed: the attempt to confer in advance on the system a world-wide monopoly; the automatic majority at the disposal of the United States in the directing Committee; and the confusion between the domestic and the international exemplified by COMSAT's dual role as both manager of the system under contract to the Committee and majority 'shareholder' on the same Committee. This last-mentioned factor, in particular, together with the fact that COMSAT's designation as manager is enshrined in the treaty and is therefore for practical purposes irreversible, introduces an element of extreme artificiality into the consortium-manager relationship; furthermore the fact that COMSAT is a body corporate of a private nature created under U.S. domestic law leads to a situation full of potential for conflict, in which multi-governmental space activities are in several respects subjected to the jurisdiction of agencies of the U.S. Federal Government, such as the Federal Communications Commission.

It is not without significance that M. Bourelly has put these and other criticisms, and some practical suggestions for reform, into the section of his article entitled 'l'aspect politique'.

This is surely right. The problems at issue and their solution are questions lying squarely in the field of policy. The least convincing portions of this book are the passages where authors like Gabriel Lafferranderie, ignoring this fact, seek to elevate to an all-dominating role hopeful but vague concepts like that of *service public international*, which are asserted not merely to be binding legal principles, but, indeed, to apply themselves automatically so as to produce unique solutions to questions of policy and practical problems alike. The well-intentioned euphoria inherent in this kind of approach sometimes becomes so overwhelming as to lead to the attribution to such principles of a type of *jus cogens* effect. Thus, for example, there is no adequate acknowledgement in the book of the fact that the INTELSAT Agreements were agreements freely entered into between sovereign States; nor does there appear to have been sufficient room for the thought that the States concerned must presumably have calculated that coming into the system would give them an over-all advantage as compared with staying out, and calculated equally that the price asked was not incommensurate with the advantage to be expected.

The reader should also be warned not to place too much faith in the announcement on the title-page and in the Preface that this book is the product of a specially constituted Working Group of the C.N.R.S., with the implication that the separate articles form a planned and integrated whole. In fact, one wonders whether the editor's blue pencil was ever unsheathed, for the amount of duplication between articles is extremely disappointing. Furthermore, the attempts to link the individual contributions by means of cross-references are, at best, hesitant and piecemeal.

Despite the criticisms voiced above, certain sections of this book are highly commendable. Particular mention should be made of Claude Guépin's introductory article on the technical background to the satellite in space, which is lucidly written and full of fascinating information. Equally interesting is the contribution by Jean d'Arcy, of the U.N. Secretariat, especially the section dealing with the utilization of satellite telecommunications by the United Nations Organization itself. And a special prize for courage is due to Jean-Louis Vencatassin, who polishes off his piece on literary and artistic property in three pages with the disarming conclusion that there *are* no special problems in this respect arising out of the outer space aspect of this form of telecommunications!

The final section of the book is devoted to an extremely useful collection of reprints of basic documents, including some that are normally difficult to lay hands on, together with a comprehensive bibliography and a calendar, in chart form, of milestones of a technical, organizational and political character in the history of satellite telecommunications.

F. D. BERMAN

*Grotian Society Papers 1968. Studies in the History of the Law of Nations.* Edited by C. H. Alexandrowicz. The Hague: Martinus Nijhoff, 1970. 232 pp. Gl. 27.

The Grotian Society, under the chairmanship of Professor Alexandrowicz, devotes itself to promoting the study of the history of international law. The first collection of its Papers (reviewed in vol. 42 of this *Year Book*) appeared in 1964.

Appropriately enough this series of Papers begins with an article by Professor O'Connell on 'Territorial Claims in the Grotian Period'. He demonstrates the importance of the issue of the Three Bishoprics of Metz, Toul, and Verdun and the Mantuan Succession Question in the development of the notion of territorial sovereignty. He also shows that the disputants in these controversies found little practical guidance in the writings of Grotius and even goes so far as to say that 'in none of the territorial disputes of the period was the *jus gentium* mentioned or the possibility of legal relations between the disputant princes adverted to' (p. 12). However, the Peace Treaties of Westphalia in 1648 brought about a change, validating the concept of cession of territory in full sovereignty, although 'the change was not adumbrated by the theorists and pamphleteers, but effected by the statesmen and diplomats' (*ibid.*).

The next article is by Miss Elizabeth Evatt who examines the steps by which British sovereignty was acquired over Australia and New Zealand in the eighteenth and nineteenth centuries. Here again it is shown that what happened in practice is not always easy to reconcile with the theories on the subject and that 'although it may be convenient to refer to a particular acquisition as occupation or cession, these categories should not be applied too rigidly'. (p. 19). This is a particularly valuable article, one of the features of which is that the instructions to, and reports of, discoverers like Abel Tasman and Captain Cook are quoted alongside the more established textbook authorities of international law. It is a rare territorial dispute which does not involve delving back into history, and contributions of this kind do a great deal to demonstrate the utility and relevance of historical studies in the field of international law. The same is true of Dr. Brownlie's essay on 'The History of the Principle of Self-Determination' (p. 90). He neatly states that the core of the principle 'consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives' (p. 90). However, while in Europe the option of nationality and the plebiscite were developed as institutions for giving effect to the principle, albeit somewhat crudely, the European nations had no compunction in denying that the principle had any application overseas. In Latin America too self-determination was subordinated to *uti possidetis* and the interpretation of existing boundary treaties, although it was found convenient to assert it in 1940 in the Act of Habana concerning the Provisional Administration of European Colonies and Possessions in the Americas. Both the League Covenant and the United Nations Charter were ambivalent on the question of self-determination, although the principle was



frequently invoked during the scramble for decolonization which took place in the decade 1955-65. Dr. Brownlie may be right in claiming that 'the more realistic lawyers in the West have more recently ceased to consign the principle to the realm of politics and have begun to examine its precise legal ramifications' (p. 98). For this new approach to hold good, however, it will be necessary to show that, even in non-colonial situations, the principle of self-determination has relevance and the capacity to prevail, for example, over the principle of territorial integrity. The Secretary-General of the United Nations, apparently reflecting the general opinion in that body, has more than once gone out of his way to say that the principle has no such standing.

Professor Schwarzenberger contributes a brief account of the trial in 1474 of Peter van Hagenbach, who had been appointed by Charles, Duke of Burgundy, as the governor of certain possessions on the Upper Rhine, which had been pledged to Charles by the Archduke of Austria. The tribunal consisted of twenty-eight judges and, although the case is often cited as an early example of a war crime trial, the offences were, as Professor Schwarzenberger points out, more of the nature of crimes against humanity. The defence of superior orders was rejected by the tribunal. This question is discussed in a broader context by Dr. Lumb of the University of Queensland, under the heading of 'Legality and Legitimacy: The Limits of the Duty of Obedience to the State'. He claims that 'the Nuremberg Trials stand out as a milestone in the history of the international recognition of human rights' (p. 52), in so far as these trials tend to reaffirm the natural law tradition in the law of nations. In the context of a historical study this approach to the question may be sufficient. Nevertheless the time has surely now come for a more probing analysis as to whether the Nuremberg Trials really were the milestone they have been claimed to be. The example of Vietnam and other conflicts of the last two decades is not encouraging.

Mr. J. E. S. Fawcett writes on 'Natural Sanctions in International Law', under which heading he deals with the familiar problem of the distinction between legal obligations and moral or other obligations. He argues that the rules of international law are less dependent upon legal sanctions than are the rules of municipal law since often the reason for the rule of international law is a 'natural sanction'. By such sanctions he means 'the need for predictability and reciprocity, the recognition of common interests, and moral compulsions', as compared with legal sanctions which consist of such things as 'non-recognition, penal legislation, or compulsory arbitral or judicial settlement of disputes' (pp. 88-9). The distinction is believed to be a valid one, although it needs more elaboration than it was possible to give it in this article.

Mr. R. Purves discusses schemes for international organizations which were put forward before 1919, an important branch of history which lawyers have not been as good at investigating as have the political scientists. Another useful historical investigation is that by Professor Rubin into 'Piracy in Malayan Waters'. The present wave of unlawful seizures of aircraft has provoked renewed interest in the definition of piracy, and there is considerable dissatisfaction with the definition contained in Article 15 of the Geneva Convention on the High Seas, 1958. It seems, however, that the definition of piracy has always presented a problem with Admiralty judges such as Sir Leoline Jenkins getting closer to the root of the matter than writers such as Grotius who was content to say 'the name of "pirate" [may be] . . . appropriately bestowed upon men who blockade the seas and impede the progress of international commerce'. The particular interest of Professor Rubin's study lies in his demonstration that the label 'pirate' was used by British and other European authorities to avoid in South-East Asia restraints placed on them by international law and municipal law, and that these authorities applied certain legal classifications to acts in that part of the world which



would not have had the same classifications applied to them in Europe. Is it any wonder, therefore, that in the politically sensitive atmosphere of the United Nations today, there is a certain reluctance to treat as piracy the diversion and destruction of the aircraft of the leading Western nations?

Professor Turack writes on 'Early English Restrictions to Travel'. Most textbooks of international law are still so much under the influence of their nineteenth-century predecessors, written at a time when travel was generally possible without passports, that with a few honourable exceptions the subject of passports has not received the attention that it deserves from international lawyers. Early restrictions on travel were as much concerned with leaving a country as with entering one (e.g. the writ *ne exeat regno*), although they were often due to ecclesiastical rather than political circumstances and sometimes operated in both directions. Thus William I was anxious to keep out papal legates and papal bulls, and also to forbid English clerics to go to Rome, at any rate without his consent.

Mr. M. B. Hooker contributes an article on 'The East India Company and the Crown 1773-1858'. This was of course the final period of the Company's existence, and many of its acts still have relevance in international law, bearing in mind especially Judge Huber's dictum in the *Island of Palmas* case that 'the acts of the [Netherlands] East India Company . . . must, in international law, be entirely assimilated to acts of the Netherlands State itself'. This article, the longest by far in this collection, is a comprehensive one and covers the Straits Settlements as well as India itself.

Coming nearer home, the final article, by Dr. Paul O'Higgins, deals with the Treaty of Limerick, 1691. For reasons which are not difficult to explain, the question of partition of Ireland has not received from English international lawyers the attention it deserves. For, even if one regards the constitution and government of Northern Ireland and such manifestations as marches of the Apprentice Boys as matters 'essentially within the domestic jurisdiction', the same *ex hypothesi* cannot be said of the border between North and South. The Treaty of Limerick was of course only one event in Ireland's chequered history, but a very important one because the laws passed by the Irish Parliament after the Treaty depriving the Catholics of 'civil rights' were seen by the latter as a violation of the Treaty. This in turn led to controversy as to whether the Irish Parliament could be bound by an exercise of the treaty-making power, and Dr. O'Higgins makes the point that the refusal to implement the Civil Articles of Limerick marked a stage in the development of the doctrine that Parliament is free under municipal law to decline to implement a treaty even if such refusal involves a violation of international law.

The study of the history of international law is a worthwhile scholarly pursuit in itself. It can also in appropriate cases be a useful, indeed indispensable, aid to the full understanding of modern problems in international law. On both these counts the publication of this interesting collection of Papers is to be welcomed.

D. H. N. JOHNSON

*Decisions of the United Nations Organs in the Judgments and Opinions of the International Court of Justice.* By ADAM BASAK. Wrocław: *Société des sciences et des lettres*, 1969, 223 pp. Zł. 45.

The author has detected a *lacuna* in the rather impressive literature on the resolutions of international organizations. It is the effect ascribed to, and the role played by, such resolutions in the decisions of courts, Dr. Basak set himself to fill in this gap in one

respect: he shows the place of the resolutions of the United Nations in the judgments and advisory opinions of the International Court. His terminology is open to some doubt. He uses 'decision' as the generic term, whereas it should rather be 'resolution'. For decision, at least in the practice of the United Nations, implies an act endowed with obligatory force, while the Court also referred to or based itself on recommendations. The latter prevail numerically among the enactments of the Organization.

The author distinguishes three categories of resolutions. First, he writes about 'decisions based on the specific authorization of the Charter' such as Article 4, paragraph 2, or Article 17, paragraph 1 (chapter 1). They also include requests for advisory opinions. Some of the generalizations made here are not quite clear. In particular, the non-binding nature of the decisions intended for specific addressees (p. 67) is not a constant feature of this category of the acts of United Nations organs, though it happened to be present in those few resolutions which the author considered in Chapter 1. Secondly, he discusses 'decisions based on the general authorization of the Charter' (chapter 2). He finds examples for these acts in Articles 11, 13, 14, 33, 34, 37, 38, 39-42, 62-6, 83, 85, 87, etc. However, the distinction between the first and the second categories of decisions does not seem fully justified. It is true that in the first group the freedom of the organ to shape the contents of the resolution is smaller than in the second; but is it a qualitative criterion of division? Dr. Basak adds that while the decisions falling under the first heading concern the internal functioning of the Organization, those of the second category 'refer to its external functions' and have a direct bearing on the fulfilment of the aims of the Organization; but is not the latter characteristic shared equally by the first category? The section on the consequences of 'defective decisions' makes interesting reading. However, a reference to Mr. E. Lauterpacht's contribution in the *Cambridge Essays in International Law in Honour of Lord McNair* is missing here. Thirdly, the author distinguishes 'decisions based on the implied authorization of the Charter' (chapter 3). While the preceding chapters suffered from a somewhat artificial over-theorization, especially in the classifications, the one devoted to the implied powers of the Organization deals with a problem the practical importance of which has induced the author to adopt a more pragmatic approach. He notes a tendency on the part of the Court to interpret these powers broadly (p. 168).

The final chapter of the book discusses the question whether the decisions of United Nations organs are a source of law. The recital of views expressed on this subject by various writers is useful though perhaps too lengthy (pp. 170-83), and Dr. Basak, in his fair and conscientious treatment of the matter, sometimes attaches too much importance to incidental remarks found in textbooks. He arrives at the conclusion that the Court regards the decisions of organs as subsidiary evidence of law or as interpretation of the Charter (p. 184). The resolutions whereby the Organization makes its internal law are for the Court the source of such law (p. 190). This view is correct, but it should be added that many of the binding resolutions of the Organization are not a source of law, but a source of rights or obligations for their addressees.

Dr. Basak's monograph is a valuable contribution to the study of the sources and evidences of international law, the practice of the United Nations and the jurisprudence of the International Court of Justice. It is a translation from Polish, and the publisher cannot escape the critical remark that he should have taken greater care in supervising the work of the translator: more often than not the English of the text is deficient.

K. SKUBISZEWSKI

*Das französische Kolonialreich und die Gründung neuer Staaten.* By ALBERT BLECKMANN. Cologne, Berlin, Bonn and Munich: Carl Heymanns Verlag KG, 1969. xiv+514 pp. DM. 68.

This is a most impressive, learned and detailed work devoted to the French colonial empire, its history, development and status, its dissolution, the co-operation between the mother country and the new States and their succession to international obligations. These matters are analysed separately in the case of Syria and Lebanon; Indochina; and Africa, viz. French West Africa (Dahomey, Ivory Coast, Guinea, Mauretania, Niger, Upper Volta, Senegal, Sudan), French Equatorial Africa (Gabon, Congo-Brazzaville, Central Africa Republic, Chad), Madagascar, Somalia, Cameroun and Togo. Throughout the author relies on original sources. The text, setting forth an evolution of extraordinary complication as well as about two thousand footnotes is of the greatest possible value to the specialist. In fact the wealth of material is such that the absence of a bibliography, an index and a final chapter summarizing the legal conclusions of a general character is both noticeable and unfortunate.

The book, published under the auspices of the Max Planck Institute at Heidelberg, is largely descriptive in character. In substance it is a work of reference of high academic quality. It is, so it is hoped, no sign of disrespect to the author's achievement if the present review refrains from any attempt at closer analysis, but confines itself to drawing attention to a publication which no student of the legal technique of colonization and decolonization can in future afford to ignore.

F. A. MANN

*Common Market Law.* By ALAN CAMPBELL. Foreword by The Rt. Hon. Lord Denning. 2 vols. London: Longmans Green & Co. Ltd.; New York: Oceana Publications Inc., 1969. Vol. I: ccxlv+601 pp. (including Index). Vol. II: vi+673 pp. £20 for two volumes.

*Judicial Remedies in the European Communities.* By L. J. BRINKHORST and H. G. SCHERMERS. Deventer: Æ. E. Kluwer; London: Stevens & Sons, Ltd.; South Hackensack, N.J.: Fred B. Rothman & Co., 1969. xxii+275 pp. (including Appendices, Table of Cases and Index). £4.50.

*Le Contrat de Know-How. Étude de sa nature juridique et du régime fiscal des redevances dans les pays du Marché Commun.* By PAUL DEMIN. Preface by Paul G. Van Hecke. Brussels: Établissements Émile Bruylant, 1968. viii+111 pp. Fr. 340 (paper covers); Fr. 660 (hard covers).

Lord Denning provides an assessment of the work of Alan Campbell and his three colleagues (John Bowyer, Philip Turl, and Marcus Edwards) in these words: 'All in all, this is a great work. I use the word advisedly. It is of the first importance that there should be a treatise in the English language covering the Law of the European Community. Mr. Alan Campbell has provided us with it. We are much in his debt for it.' Mr. Campbell is one of the small number of English lawyers who have cultivated the vast field of legal problems concerning the Common Market. The present treatise replaces the more modest volume on *Common Market Law* published in 1962.



The first volume comprises nine chapters on the following topics: Community Law; Agriculture; Restrictive Trading Agreements; Industrial Property; Transport; Court of Justice (Structure and Jurisdiction); Court of Justice (Practice, Procedure, Interpretative Techniques); Association, Accession and External Trade Agreements; and Reciprocal Enforcement of Judgments, Mutual Recognition of Companies and the European Company. This volume also includes extensive tables, in particular a table of regulations, a subject index to the regulations affecting agriculture and related subjects, a table of cases and a general index designed to cover both volumes.

The second volume comprises the Treaty of Rome (in the 1967 H.M.S.O. translation) annotated, together with forty-one appendices. These appendices include various Protocols and Annexes of the Rome Treaty, the Yaoundé Convention, the International Convention for the Protection of Industrial Property and useful items such as an unofficial translation of the *Guide Pratique* to Articles 85 and 86 of the Rome Treaty, published by the E.E.C. Commission. There is also a special appendix concerned with the most recent developments relating to restrictive agreements. In general the material in the volumes covers the period ending in about November 1968 though certain later items are mentioned.

The object has been to provide a reference work and this has been successfully achieved. The great mass of material has been organized and broken up into submissive portions and paragraphs. A good deal of selection has been necessary. The practitioner, the academic and the businessman will find these volumes of great value. The standard of presentation and production attained by the publishers is a matter for congratulation.

Substantial coverage is given to restrictive trading agreements and the Court of Justice and emphasis is given to the role of the Court in developing community law. The exposition is generally clear but varies in quality. The treatment of restrictive trading agreements benefits from successful use of cases and examples but elsewhere cases are too often used as citations supporting rather abrupt propositions. Occasionally the expression is less than graceful (see, for example, p. 49, para. 1.92). A general fault is a reluctance to refer to relevant legal experience from other fields. It is pointed out in the text that the Court of Justice is prepared to use analogies and may refer, for example, to the work of the International Court (see p. 40). However, when problems concerning the relation of municipal law and treaties are considered, there is insufficient reference to the background of legal experience on this issue. Similarly, no guide to relevant material on treaty interpretation is furnished when the experience of the Court of Justice is examined in that connection. The chapter on transport includes a section on the regime of the Rhine but lacks reference to relevant items on the subject of international waterways, including a useful article by Johnson (*Michigan Law Review*, 62 (1963-4), p. 465). Again, when the author raises the issues of *locus standi* and justiciability in relation to the work of the Court of Justice, no use is made of the experience of the European Court of Human Rights, for example, in the *De Becker* case, in approaching issues which have become moot. The problems of space notwithstanding, a broader conception of what is relevant and useful is needed in approaching certain types of problem.

It has been pointed out that the treatment is selective and yet, even so, much ground is covered. Thus the chapter on industrial property is of considerable interest. It includes a discussion of 'know-how' and the proposal for a convention on the subject. The text is, however, innocent of reference to literature on 'know-how'. It is to be noted that Dr. Paul Demin has contributed a short but informative study of the 'know-how' contract with particular reference to the tax regime governing royalties in the

countries of the Common Market. Other matters of special interest touched upon by Mr. Campbell include the relation of the British constitution to membership of the Communities and a proposal for a European Company (*Societas Europea*). When such a wide range of material is presented, it is always possible to suggest that parts could have been improved upon. Few lawyers have the experience and energy to produce a treatise such as this and it remains for the reviewer to wish the book a long life. Its practical value will be enhanced by the provision of a supplement service.

The case book produced by Professors Brinkhorst and Schermers is an excellent aid to the study of a subject both practically and academically significant. It is reasonably economical in presentation but is nevertheless substantial enough to cover the somewhat complex subject-matter. Each chapter and section has an introduction which includes essential treaty provisions. There is quite considerable reference to the literature on each major topic and each case is furnished with references to sources and commentaries. The material will be of value to those concerned with European integration, international institutions at large and comparative public law.

IAN BROWNLIE

*The East African Community and Common Market.* By INGRID DOIMI DI DELUPIS. London: Longmans Green & Co. Ltd., 1970. 161 pp. + Notes, Bibliography and Index. £1.

In this short book Dr. Doimi di Delupis (formerly Dr. Ingrid Detter) provides a lucid introduction to a subject on which little has been written and about which little is generally known. A short account of the history of co-operation between Kenya, Uganda, Tanganyika and Zanzibar during the colonial period and immediately afterwards is followed by a discussion of the Community and Common Market, its organs, powers, procedures and international personality. The author then examines the treaty between the East African Community and the E.E.C., contrasting it with the Yaoundé Convention and noting its close similarity to the Lagos agreement between the E.E.C. and Nigeria. In a concluding chapter the author offers some constructive criticisms of the institutional arrangements of the East African Common Market, suggesting, for example, that the wide powers of delegation of the Authority could usefully be subjected to some external check, and that the tenure of office of the Ministers of the Community should not be subject to the control of the member States. The author concludes on a hopeful note, foreseeing the possible expansion of the Community and predicting a bright future.

Dr. Doimi di Delupis's discussion is clear and interesting throughout. Two omissions must be mentioned, however. The first is that there is little discussion of the operation, as opposed to the formal structure, of the Community. In an introductory work on a very new institution this is of course entirely understandable. But the remarkable divergences between theory and practice so frequently found in international institutions lead one to hope that when a sufficient amount of evidence is available the author will produce a second volume, clothing the bare bones of her introductory work.

The other shortcoming is more serious. There is throughout little consideration of the political circumstances of the Community's origin and the political conditions necessary for its success. No doubt an introductory work is not the place for a detailed discussion of these questions but it would, for example, be interesting to know why though federation was rejected in 1964, shortly afterwards the three member States

felt able to hand over a good deal of their autonomy to the East African Common Market. Such consideration of the cohesive and divisive pressures operating on the institution would seem to be a prerequisite of any discussion of its future prospects. Similarly, it is quite unrealistic to discuss any international institution in Africa without considering how far domestic instability in the member States poses a threat to its survival.

The book is well produced with only one or two minor misprints. The footnotes are clearly set out at the back, together with a short bibliography and index. There is also an unusually detailed table of contents. For those not familiar with the details of East African geography (the road and railway systems, for example) a sketch map would have been very useful.

J. G. MERRILLS

*Der Grundsatz der Freiheit der Meere in der Staatenpraxis von 1493 bis 1648.* By GUNDOLF FAHL. *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol. 51. Köln, Berlin: Carl Heymanns Verlag KG, 1969. viii + 143 pp. DM. 28.

The author pictures the conflict between trade monopolies and the concept of the freedom of the seas, and illustrates it with many finds of documents of which the international lawyer has been unaware. He goes back beyond Alexander VI to show that from 1344 on the Popes accorded special rights to discoverers and conquerors. So it does appear that the celebrated Bull 'Inter caetera' was not an exceptional occurrence. Fahl insists further on the limited scope of that Bull and the other Bulls accompanying it, as well as the Treaty of Tordesillas. There was no division of the world, merely a delimitation of spheres in the Atlantic.

Portugal and Spain tried to evolve absolute rights over the trade with the East and even over the sea, but they met the opposition of France, England and Holland. Fahl carries his study through to the Peace of Westphalia where the liberty of the sea was indirectly recognized, but the monopoly respecting the trade with acquired possessions maintained.

The history of international law has too often been written as a history of the doctrine. Here we have a valuable specimen of history of conflict. In part the book of J. K. Oudendijk, *Status and Extent of adjacent Waters* (1970), may serve as a continuation of Fahl's work down to 1800.

F. MÜNCH

*Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten.* By KONRAD GINTHER. *Forschungen aus Staat und Recht* edited by W. Antonioli and G. Winkler, vol. 8. Wien-New York: Springer Verlag, 1969. vii + 202 pp. AS 240 (DM 38, \$9.50)

Professor Ginther's book on the liability of international organizations towards third States in international law, according to his own words, is not an attempt to tackle the subject-matter in a final and comprehensive way. It is merely an effort to open up



academic discussion on a topic grossly neglected so far. The material available is scarce and the author being fully aware of that fact does not restrict himself to its purely empirical examination, which would most probably lead to the negative result that no general rule of international law regarding the liability of international organizations for tortious acts of its organs yet exists. The most remarkable feature of this book probably lies in the fact that it constitutes a very successful synthesis of the inductive and deductive methods. The existing material on practice and treaty-drafts is not looked at in isolation but in a wider framework of the author's systematic idea of the problem supported by a profound dogmatic basis.

After a short introduction Professor Ginther even goes to the length of elaborating his methodological approach to international law in general in nearly 20 pages, an undertaking which, although it may perhaps appear superfluous in a study on a specific subject such as the present one, still yields a most interesting little essay on the problems facing the academic writer in the field of international law.

The examination proper is introduced by some basic considerations on legal personality in international law. After a discussion on State sovereignty and on the various theories concerning the legal personality of international organizations, Professor Ginther comes to the conclusion that personality as such does not imply the direct transfer to international organizations of the concepts of legal capacity and the capacity to incur obligations and commit tortious acts as they are connected with States. Nor does such a liability arise by necessary implication from the constitutions of international organizations by way of a teleological interpretation as being essential to the performance of their duties.

The author then proceeds to distinguish between international organizations with mere 'integration-personality' and those with the capacity to be liable for damages. While the former are only intensified and institutionalized means for the creation of law in inter-State relationships (e.g. O.E.C.D., G.A.T.T.), the latter are created for the distribution of cost and risk in specific enterprises (e.g. E.L.D.O., E.S.R.O.). Since they are conceived by the founding States as potentially incurring liabilities in the course of their activities, their legal personality is intended as embracing capacity to be responsible for tortious acts of their organs. Without elaborating in detail how to categorize the multitude of different types of organizations in this system, the author admits that the United Nations would fall into both categories. A survey of opinions of writers on the subject is followed by a short examination of constitutions of international organizations leading to the conclusion that the occurrence of liability does not seem to have been taken into consideration by the respective drafters. By far the largest part of the chapter on practice is taken up by a detailed investigation into the preparatory works to international conventions, namely the Brussels Convention on the Liability of Operators of Nuclear Ships, the so-called Space Treaty and to a treaty on the liability for damage caused by spacecraft. This is followed by a much shorter look at practice in connection with damage caused by United Nations forces.

In his conclusions the author again follows his threefold pattern as set out above: In respect of the United Nations he is of opinion that the sparse material points to the organization's general liability for illegal acts of the organs without any subsidiary responsibility on the part of member States. He emphasizes, however, that the question of an obligation to make financial contributions for the purpose of paying damages has to be carefully distinguished from the question of responsibility itself. In respect of the two other categories his tentative hypotheses are as follows: In the case of the organizations capable of bearing liability for damages, primary responsibility will lie with the organization itself, while a secondary liability is to be borne by member

States. In the case of organizations with mere 'integration-personality', sole responsibility for tortious acts will, however, lie with member States.

The reader of this book who wishes to inform himself only on the basic problems concerning the responsibility of international organizations may find it a bit technical in some passages and will perhaps find going through all the details of the various treaty-drafts slightly laborious. But then the book is not meant for undergraduate reading. The rather complicated language alone will make it difficult enough for students of international law and for those without a good command of German.

Altogether there can be no doubt that this book, with its careful balance of practice and theoretical thinking, constitutes a most valuable contribution to the literature on international organizations. Nobody dealing with the subject can afford to ignore it.

CHRISTOPH H. SCHREUER

*Supranationalism and International Adjudication.* By FOREST L. GRIEVES. Urbana: University of Illinois Press, 1970. xix+266 pp. £4.75.

International courts have existed throughout this century so there must be something in them. Professor Grievés studies five courts, the Central American Court of Justice, the Permanent Court of International Justice, the International Court of Justice, the Court of the European Communities and the European Court of Human Rights. He analyses these with a view to measuring their degree of supranationalism. The supranational position he defines as somewhere between the international and the federal, implying some degree of limitation or transfer of sovereignty. On this basis the impetuously created but rather ineffectual and ill-fated Central American Court of Justice was surprisingly supranational for its time. However, as is the case with the Court of the European Communities, which in jurisdictional terms is the most supranational of all the courts studied, the Central American Court of Justice had little enforcement power. On paper the charters of the Permanent Court of International Justice and the International Court of Justice show relatively strong enforcement mechanisms, but only minimal supranational significance since their jurisdictions are dependent on initial consent either *ad hoc* or by a State signing the optional clause. The Central American Court of Justice and the Court of the European Communities constitutions allow for jurisdiction over individuals and domestic institutions, a jurisdiction denied to the Permanent Court of International Justice and the International Court of Justice. Noticeably in its fifteen years the Court of the European Communities has dealt with seven times as many cases as the International Court of Justice in twenty-five years.

Professor Grievés enters into an intelligent discussion of the background and practice of the courts. He is particularly good on the case law of the Central American Court of Justice. He has less material available on the European Court of Human Rights which has had few cases to consider and concerning the constitution of which the *travaux préparatoires* are unfortunately not a matter of public record. This latter court is interesting for having supranational potential in its provisions for compulsory jurisdiction under Article 48 of the Convention and also in providing a back-door jurisdiction over individual complaints referred to it by the European Commission of Human Rights, but the absence of case studies precludes much anticipation of how it could develop. The work is well written, is clearly and intelligently presented and can be read with profit.

J. A. ANDREWS

*Les Exceptions d'incompétence et d'irrecevabilité dans la procédure de la Cour internationale de justice.* By ÉTIENNE GRISEL. Berne: Éditions Herbert Lang & C<sup>ie</sup>. S.A., 1968. 241 pp. S.Fr/DM 36.

Article 62 of the Rules of the International Court, empowering defendants to raise 'preliminary objections', leaves open many important questions, notably the nature of such objections, their classification, and their relations with one another and with the merits. For the sake of flexibility the Court, both in the *travaux préparatoires* of the Rules and in its judgments, has tended to avoid theoretical discussion of these matters, and it has been left to the commentators to extract what principles they can. While by no means the last word, this book is a useful addition to the literature on the subject.

Dr. Grisel first establishes the two main categories to which preliminary objections can relate, which he calls *compétence* and *recevabilité*. (Satisfactory English equivalents are hard to find, in view of the variations in usage, but for present purposes they can be rendered as 'jurisdiction' and 'admissibility'.) The first category relates to the reality of the parties' consent to the jurisdiction: to put the matter simply, the Court must be properly seized of the dispute and there must be a valid title of jurisdiction (*compromis*, etc.). In the view of the learned author, only objections based upon the existence or basic validity of this title should be raised in preliminary proceedings; logic and convenience demand that objections based upon reservations or prescriptions *ratione temporis*, *materiae* or *personae* be joined with the merits. In the context of admissibility, he takes a similar and even more unconventional attitude towards the conditions for the exercise of the right of diplomatic protection (nationality of claims, exhaustion of local remedies, 'clean hands'); these too must be joined with the merits, and normally only objections based upon 'purely procedural' defects (e.g. *exceptio obscuri libelli*, expiry of time-limit, earlier discontinuance of proceedings) may be considered in preliminary hearings. In the opinion of the present writer, Dr. Grisel's logical justifications for this severe truncation of the scope of preliminary objections are insufficiently developed (notably where the exhaustion of local remedies is concerned); the case for its convenience is more convincing.

The author also discusses several other matters, such as the correct order of examination of preliminary objections, the right of the Court to examine them *ex officio* or to admit objections which have been submitted after the expiry of the prescribed time-limit, and the legal effect of a preliminary judgment. Space does not permit consideration of these arguments here, but it may be noted that the author is convinced that a decision on preliminary objections is conclusive, and he is consequently highly critical of the judgment of the Court in the *South-West Africa* case (Second Phase), 1966.

It is a pity that so interesting a work should contain irritating defects which can only be attributed to a lack of consideration for readers. The relevant facts and pleas of parties are sometimes inadequately presented; there is no index; and, most inexcusable and astonishing of all in a book devoted to the law and practice of the Court, there is no table of cases.

MAURICE MENDELSON



*Staatensukzession und Staatenintegration. Ein Beitrag zur Frage der Kontinuität völkerrechtlicher Verträge bei Staatenzusammenschlüssen.* By GOTTFRIED HERBIG. *Sozialwissenschaftliche Bibliothek*, vol. 2. Mainz: Hase & Koehler Verlag, 1968. 175 pp. DM. 22.

As its sub-title indicates, the study under review limits itself to succession in cases of State fusion and integration. Nevertheless, the approach the author offers for his restricted theme and his general results imply the more recent and frequent, and therefore more interesting cases of cession of territory and emancipation. Succession in general is also implied in that large part of the book which is devoted to recapitulating the doctrine and practice of succession.

The author, in his analysis of the traditional doctrine and practice of succession, considers it as a product of a more primitive conception of international law. Primitive international law is concerned only with relations between States; it has admitted annexation, which in the view of the author is contrary to what he calls material law; and even the dynastic principle, under which sovereignty was inherited, has left its mark upon succession theory. The burgeoning of the democratic principle has laid the accent on the functional effect, and the new idea of human community pervading modern international law ought to give a new foundation to the doctrine of succession.

Therefore the author insists, in the interest of general order, on continuity of treaties and excepts only alliances which appear to him as strictly State-to-State relations without general interest. Logic demands that treaties binding only some of the unities that have become integrated, continue in their regional limits only and do not extend to the entire new State or community. In order to eliminate the obvious weakness of this proposition, the author affirms an obligation of the parties concerned to negotiate for a revision of treaties affected by succession. Similarly, one finds remarks on *rebus sic stantibus*, in which context the author stresses the duty of the party recurring to that clause to act also in the interest of the other party, and on a deeper understanding of coexistence.

The reader may not be convinced that the arguments proffered in this book are clear enough and sufficient. He may think that practice alone warrants its conclusions; in fact, practice shows how much more succession occurs in the present emancipations than traditional doctrine would indicate. Also in the past, as detailed studies have reminded us, State integration like the forming of the German Empire has respected existing treaties (Rauschning, *Das Schicksal völkerrechtlicher Verträge bei der Änderung des Status ihrer Partner* (1963); Silberkuhl, *Sukzession des Bundesstaates in völkerrechtliche Verträge seiner Gliedstaaten bei der Errichtung des Norddeutschen Bundes und dessen Erweiterung zum Deutschen Reich* (Bonn, 1967)). One may ask why the author does not make more of that 'succession in function' which has been developed in the jurisprudence of modern German public law. Nevertheless, if one reads this work with an open mind, its merit in proposing an adequate explanation and new formulae for the present positive law of succession must be acknowledged.

The succession theme is popular in Germany. Besides the two theses just mentioned there are others by Beisswingert and Leonore Herbst, of 1960, an article by Mahnke, of 1967, and the papers of Kordt and Zemanek for the meeting of the German Society for International Law in 1964—all recorded in the bibliography. Moreover, another thesis has been deposited at Freiburg: W. Fiedler, *Staatskontinuität und Verfassungsrechtsprechung*.<sup>1</sup> This interest, however, does not seem to stem from difficulties in

<sup>1</sup> Published by Verlag Karl Alber GmbH, Freiburg and München, 1970.

interpreting the present situation of Germany; the dominant opinion has been in favour of continuity with the pre-1945 State.

F. MÜNCH

*General Principles of Law and the International Legal Order.* By GEZA HERCZEGH. Budapest: Akademiai Kiado, 1969. 129 pp. £2.50.

This is a study of the part played in international law by general principles of both municipal and international law, written with particular emphasis on the Hungarian and Russian literature on the subject, but taking full account of the works of other writers such as Verdross, Kelsen, Lauterpacht and Cheng. The starting-point is, naturally, Article 38 (1) (c) of the Statute of the International Court of Justice. Tracing the history of this provision, the author points out that very little attention was given to it at the San Francisco Conference, and that there is no reason to give it a construction other than that of the Committee which originally drafted it in 1920. The balance of opinion in that Committee was that the general principles referred to were those underlying municipal, rather than international, law, and this is the thesis adopted by the author throughout the work. (In view of this, it is perhaps surprising that only the last chapter is concerned with the application of the principles of municipal law in international law, whereas the two central chapters comprise a study of the principles of international law.) An examination of the literature on the subject reveals a considerable divergence of opinion, the majority of Soviet authors favouring the principles of international law, whereas 'in Western literature . . . not even a dominant position can be discovered'. The author therefore turns to the practice of the P.C.I.J. and I.C.J. He appreciates the confusion arising from the fact that the Court has frequently used the expression 'principles of international law' to describe rules of customary international law, but his collection of the Court's pronouncements which, he says, refer to principles of municipal law is not wholly convincing. The Court has never expressly considered the meaning of Article 38 (1) (c), and when it applies a principle such as the prohibition of the abuse of rights, it is extremely difficult to say whether it is having recourse to a principle of municipal law, or to an analagous principle of international law.

In Chapter 2 the notion of a principle of law is discussed, and a principle is defined as 'a norm of general validity and content which is manifested not in a single statutory provision, but invariably by groups of mutually interdependent legal rules or their system, and as such is as binding as the particular provisions which have come into being by giving a positive form to the content of a principle of law, as the realization and enforcement of this principle'. A principle therefore differs from a particular legal rule because of the generality of its content. In international law, principles are derived from the general provisions of treaties and customary law; as an illustration the author cites the derivation of a principle of prohibition of the use of force from the provisions of the Covenant, Kellogg-Briand Pact and Charter. He points out that the Charter of the United Nations is of prime importance in the study of general principles, especially in view of Article 103, and considers the so-called principles set out in Article 2.

Here and throughout the book, the author emerges as a champion of positivism, constantly emphasizing that all law is derived from the consent of States, and there are at least three references to that overworked passage from the judgment in *The Lotus*: 'The rules of law binding upon States therefore emanate from their own free will. . . .'

He concludes, therefore, in Chapter 3, that treaties and custom are the exclusive sources of international law, and that principles of international law are derived from those sources and so are not in themselves a source of law. Their function lies in the interpretation and application of particular rules. (This again is discussed with reference to the Charter, and there is also an interesting study of the evolution of various principles.) But if this analysis is adopted, the author is surely inconsistent when he says that particular rules sometimes have to give way to general principles, so that 'unequal treaties' cannot stand with the principle of the right of self-determination (p. 73). A discussion of *jus cogens* follows. The rules of *jus cogens*, says Herczegh, are not rules of a superior system of law, but are based on universal agreement, so that whilst they are optional for the international community as a whole, individual States cannot contract out of them without the consent of the rest of the international community. Rules of *jus cogens* are not to be equated with general principles; the same applies to 'programme-like norms', skeletal objects of which the legal significance is somewhat obscure, at least to the present reviewer.

In the final chapter, the author returns to what he claims to be the subject-matter of Article 38 (1) (c), the general principles of municipal law. These, he says, can never be sources of international law because they are not the product of the will of States. The mere existence of a principle in the law of a large number of States does not automatically mean that there is a similar principle in international law. But the judge of an international tribunal may exceptionally have recourse to principles of municipal law in order to fill gaps of international law. This gives him a degree of elasticity in the application of particular rules, and may in time contribute to the evolution of rules of customary international law, although a warning is sounded against the attribution of legislative authority to international tribunals. In this respect, a contrast is made between Article 38 (1) (c) and Article 38 (2); the latter, in empowering the I.C.J. to give judgments *ex aequo et bono* where the parties so agree, represents a half-way house between diplomatic negotiations and judicial settlement, and implies a degree of legislation on the part of the Court.

Some of the theories in this book may seem unacceptable to Western lawyers, but they are clearly and interestingly presented; in particular, there is an informative exposition of the principles of peaceful coexistence at pp. 49-51. The translation from the Hungarian is occasionally somewhat stilted, especially in the Introduction. Although the standard of printing is quite good, the price seems inordinately high.

C. A. HOPKINS

*Social Justice in the Law of Nations. The I.L.O. Impact after Fifty Years.* By C. WILFRED JENKS. The Hersch Lauterpacht Lectures, 1969. London: Oxford University Press (for Chatham House), 1970. ix+88+Bibliography and Index. Oxford Paperback 60p.

The question which Dr. Jenks poses is, how must international law change to meet the challenge of a changing world? Specifically, what may be learned from the experience of the International Labour Organization? No one is better qualified to undertake such an enquiry and, as one would expect, Dr. Jenks's answers are at once penetrating and provocative.

He divides his study into two parts. In the first he examines the I.L.O. as an institution, suggesting that in it are to be found a number of valuable features as yet absent



from the United Nations: a clear mandate in the constitution of the I.L.O., directing adjustment to changing circumstances; a unique structure and legislative procedure; and effective supervisory, judicial and fact-finding procedures. In each the author finds important lessons. Typical is his discussion of I.L.O. fact-finding procedures. After making the point that the value of fact finding is enhanced when disagreement exists on the law, he describes a number of most interesting examples of the work of the I.L.O. in this field, including the investigation of the complaint by Ghana against Portugal in 1961 and the counter-proceedings by Portugal against Liberia.

In the second part of his study Dr. Jenks discusses the substantive achievements of the I.L.O. in a number of important areas of international law. He explains how a major success here has been the particularization of the general legal or moral obligations of States in the field of human rights. This is, he explains, to be found even in respect of those rights normally thought of as primarily standard-setting, viz. economic and social rights, as well as in the field of civil and political rights. The work of the I.L.O. in laying down labour standards and thereby to a great extent unifying municipal legal systems is of course well known and is rightly hailed as another major substantive achievement.

These discussions contain much of value. There must, however, be some doubts as to whether the picture drawn by Dr. Jenks is not in some ways a little unbalanced. The major obstacles to the goals set by Dr. Jenks are the ideological differences between East and West and the conflicting interests of advanced and underdeveloped States. These differences can of course be seen in the I.L.O. as elsewhere, and from time to time the author notes this, mentioning, for example, the refusal of the African members of the Governing Body to permit an investigation by the Organization into Portuguese activities, an investigation actually requested by Portugal in an attempt to vindicate her policies. But the significance of such incidents seems to be very much underplayed. Whenever possible Dr. Jenks prefers to emphasize common interests and encouraging trends. His comments on the position of trade unions in the Soviet system, for example, and the problem of their representation in the Organization, altogether fail to bring out the fundamental issues involved. This readiness to minimize basic differences is epitomized by the author's unwillingness to recognize the complexity of the question whether industrial relations should be regulated by law. His own view is that they should; it will be recalled, however, that in Britain—following the recent report of the Donovan Commission—this question has been the subject of acute controversy. When such dissension is to be found in a highly homogeneous municipal society it seems premature to identify common interests on this matter on the international plane.

These may seem harsh criticisms of a work of a mere one hundred pages which must obviously be selective. Certainly it is not intended to minimize the real merits of this study: but the ideals of which Dr. Jenks is the respected advocate cannot be advanced without a balanced appraisal of the present complex position.

J. G. MERRILLS

*Zwischen Staat und Weltstaat* By ANDREAS KHOL. Wien-Stuttgart: W. Braumüller Universitäts-Verlagsbuchhandlung Ges. M.B.U., 1969. xxiv + 628 pp. D.M. 66.

This is a massive study of the various international processes for the protection of human rights. It is concerned essentially with procedure rather than content, with system rather than function, doing for the whole range of international process what Monconduit has done for the working of the European Convention on Human Rights. The first three parts of the work are largely descriptive of international systems and instruments of protection of human rights, and of the ways in which they work; the last part analyses the juridical and procedural concepts involved.

The first part introduces two concepts, that of international community agreements (*Kollektivverträge*), which do not create reciprocal rights and duties for States but embody an objective common interest secured by co-operation of States rather than particular State action; and that of individual claims on the international plane, the handling of which has analogies with municipal law processes. Within this framework the author sees the protection of human rights as resting on a combination of community agreements, recommendations of international organizations and domestic public law, these being in some degree interpenetrating.

In the second part the author divides the particular systems of protection in two ways: into the political and the quasi-judicial, and into those which do (individual) and those which do not (general) rest upon the making of particular claims or complaints. Political and general are broadly the reporting systems, and comprise, for example, Article 87a of the U.N. Charter, the U.N.E.S.C.O. Convention against Discrimination in Education, the European Social Charter and Article 57 of the European Convention on Human Rights. As regards the last, the author argues that the request for reports and their evaluation are the sole responsibility of the Secretary-General of the Council of Europe, and notes the modest results of the only use to date of the provision. Examples of political and individual systems are petitions to the U.N. Trusteeship Council, and those brought under Articles 24 and 25 of the I.L.O. Convention. It is not clear why the author includes complaints to the U.N. Human Rights Commission in this group, since they cannot be formally treated as petitions; further, the Commission has recently begun to function in certain situations as an organ of protection of a political and general kind.

The third part of the book is devoted to the European Convention on Human Rights, again on rigorously systematic lines. There is an interesting excursus (pp. 309–22) on the extent of the operation of the Convention *ratione personae* (*Drittwirkung*), but here on the question of State responsibility under the Convention for the acts of individuals, the place of criminal proceedings in the exhaustion of remedies needs examination; and the responsibility for the incompetence of a lawyer, assigned *ex officio* for the defence, depends not, as suggested by the author, upon the choice being mistaken or upon his actual conduct, but upon whether the court has, despite his incompetence, ensured a fair hearing.

The fourth part is a theoretical analysis of the structural features and procedural devices of all the various systems surveyed earlier in the book; and, perhaps characteristically, the efficacy of these systems, whether as to their acceptance by States or their performance, is discussed in conceptual rather than practical terms.

Nevertheless, the book is outstanding in its comprehensiveness—all the human rights organs and systems of the League, I.L.O., U.N., and Council of Europe, and the Interamerican Commission of Human Rights are covered—and it is most valuable for

its lucid and systematic arrangement. It is marked throughout by acute and perceptive reasoning.

J. E. S. FAWCETT

*China and International Agreements: A Study of Compliance.* By LUKE T. LEE. Leyden: A. W. Sijthoff; Durham, N.C.: Rule of Law Press, 1969. 231 pp. Fl. 25.

The task of evaluating the extent to which States comply or fail to comply with obligations undertaken in engagements with other States or with international organizations is a vexing one. It is probably true that most States observe most of their treaties most of the time. Although one must have less confidence with regard to treaties affecting the vital political interests of contracting parties, unilateral abrogation of agreements on the ground of breach by another party is relatively uncommon.

The seemingly simple process of observing the actions of States and comparing them with normative standards is nearly always subjective; obtaining accurate data on the behaviour of a party is difficult, particularly for the outside observer, and the applicable legal norms may range from highly explicit to exceedingly general prescriptions of behaviour. And, assuming a breach has occurred, it may be relevant whether the violation was accidental, intentional, the result of special circumstances, the action of an unauthorized official, or otherwise. In the light of such considerations most international lawyers refrain from making sweeping generalizations about the treaty performance record of individual States.

This is not so in the political arena. The Cold War, in particular, has seen broad allegations on both sides about duplicity in treaty relations. Jurists in socialist countries have accused 'imperialist' States of constantly violating their agreements. In the United States a congressional subcommittee published a study 'proving' that the U.S.S.R. had violated every political agreement to which it was party. Embarrassed by this tendentious but politically appealing document, the U.S. Department of State compiled its own shorter list of treaties violated by the Soviet Union. Both these documents created difficulties in the early 1960s when the international climate had changed and the advice and consent of the U.S. Senate was sought for the limited nuclear test-ban treaty and the U.S.-U.S.S.R. consular convention.

Dr. Lee is very much concerned that the emotional evaluations so prevalent in Soviet-Western treaty relations will obstruct efforts to bring the People's Republic of China into closer ties with the rest of the world. Focusing, quite properly, upon Chinese State practice rather than ideological propaganda, Lee concludes that there is no real basis for holding that China has frequently displayed bad faith or violated its treaty commitments more than other States.

The greater portion of his monograph, apart from a brief chapter on the concept of treaties in traditional China, is devoted to appraising Chinese behaviour in relation to boundary treaties (primarily the 1960 Sino-Burmese treaty), the Sino-American ambassadorial talks, the Korean Armistice Agreement, fisheries agreements with Japan, trade agreements with Canada, Cuba, Japan and the Scandinavian countries, economic and cultural agreements generally, dual-nationality treaties and Chinese relations with U.N.I.C.E.F. There are, in addition, some 90 pages of appendices reprinting Lee's valuable essays on 'Introduction to the Chinese Concept of Law' and 'The Extra-territorial Regime in China', as well as the texts of several treaties and of the Statute and Rules of Procedure of the Chinese Maritime Arbitration Commission.



The chapters on the Sino-Japanese fishery agreements and the Korean Armistice contain much new material gleaned by the author from outstanding Japanese collections on China, from interviews with diplomats and journalists throughout the Far East who have had close contact with China and from investigations in the records of the Military Armistice Commission housed in Seoul, Korea.

With due regard, however, for the author's worthy objective of seeking to erase emotional prejudices about China's performance of treaties, it would be as unwise to draw sweeping conclusions from Lee's study as from those which have been unredeemingly critical of Chinese policy. Just as lack of data and ambiguity of expectations and standards render it difficult to characterize negatively, a nation's record of treaty compliance, so too do the same factors counsel caution in making the opposite assessment. Even a positive evaluation by one party of another's behaviour can be suspect, as the Soviet-American treatment of ventings under the 1963 limited nuclear test-ban treaty testifies.

In this connection it is curious that Lee uncritically accepts the view that Soviet compliance with treaties has been abnormal (p. 16), and his analysis of Chinese behaviour under the Sino-Soviet cultural agreements is most charitable to China considering the dearth of available information. Similarly, Sino-Indonesian relations under the dual-nationality agreements are immensely more complex—and difficult to characterize in compliance-violation terms—than the author's cursory treatment suggests.

While in all fairness the study can only be said to prove that in some diplomatic and professional quarters there is general satisfaction with China's performance under certain agreements or kinds of agreements, this is very useful information; and hence the decision to omit from consideration the impressions of the same sources regarding China's compliance with customary international law and with the numerous treaties of peace, friendship or non-aggression is all the more regrettable.

W. E. BUTLER

*Die Neutralen in der europäischen Integration. Kontroversen—Konfrontationen—Alternativen.* Ed. by Hans Mayrzedt and Hans Christoph Binswanger. *Schriftenreihe der Österreichischen Gesellschaft für Außenpolitik und Internationale Beziehungen*, vol. 5. Wien-Stuttgart: Wilhelm Braumüller, 1970. xvi+496 pp. Sch. 392.

About twenty authors have contributed to this volume which explains the problems and attitudes of Austria, Sweden and Switzerland when dealing with European integration, and especially the Common Market. The international lawyer will be particularly interested in the first chapter in which W. Hummer (Vienna) tries to develop the legal significance of Austrian neutrality, the international status of which is not as clear as Austrian writers and statesmen represent it to be. Hummer deals also with the question whether integration into a unit where Germany is a member would contravene the interdiction of 'Anschluß'. The same author, in chapter 10, draws conclusions on the compatibility of neutrality with membership of the Common Market, and Ohlinger writes in chapter 15 on the constitutional issues raised in Austria by possible conventions with the Common Market. Binswanger, a Swiss, seeks answers to the same questions for his country in chapters 6 and 11. The whole volume has considerable relevance to issues current in Europe.

F. MÜNCH

*Transit Trade of Landlocked States.* By J. H. MERRYMAN and E. D. ACKERMAN. Hamburg: in *Kommission beim Alfred Metzner Verlag*, Frankfurt am Main und Berlin, 1969. 162 pp. DM. 27.90.

The older works on international law seem to have been more interested in the question of landlocked seas than in that of landlocked States. Interest was aroused in the latter problem, however, by the difficulties experienced by Swiss merchants during the Franco-Prussian War and the First World War. Huber wrote a monograph on the subject<sup>1</sup> and at the Barcelona Conference in 1921 a Declaration was signed under which the signatory and acceding States 'recognize the flag flown by the vessels of any State having no sea-coast which are registered at some one specified place situated in its territory'.

The right to a flag is, however, by no means a complete solution to the difficulties of landlocked countries. In 1956, when the General Assembly began preparing for the first United Nations Conference on the Law of the Sea, a group of these countries pressed for the inclusion on the agenda of an item concerned with their particular problems. Their request was granted even though, unlike the other matters referred to the Conference, no consideration had been given to it by the International Law Commission. Instead there was a hastily convened Preliminary Conference of Landlocked States, held in Geneva just before the main Conference, which produced a set of seven Principles, the first of which was expressed as follows: 'The right of each landlocked State of free access to the sea derives from the fundamental principle of freedom of the high seas.' In practice, in order to give effect to this right, the principle of equality of States has to be invoked as well and the problem is of course to reconcile the right of free access to the sea with the territorial sovereignty of the intervening State. Moreover, if the right of free access is granted, this is to give the landlocked State a right of transit which other States in general do not enjoy. Consequently the problem is very much wider and more complicated than the mere question of a right to a maritime flag. As many landlocked countries are also 'developing countries', their special difficulties have now become wrapped up with the general problem of economic development.

The Geneva Conference of 1958 produced a few articles (especially Article 3 of the High Seas Convention) which gave limited satisfaction only to the landlocked countries, and so the pressure has been kept up, notably through the United Nations Conference on Trade and Development (U.N.C.T.A.D.), which produced another set of 'principles' in 1964, and the Convention on Transit Trade of Landlocked Countries which emanated from a special United Nations Conference held in New York in 1965.

This book results from a study made under the auspices of the Stanford Research Institute, Dr. Merryman being a Professor of Law at Stanford University and Dr. Ackerman having been a student there and also an instructor in the Stanford-Chile Law Seminar. Between 1966 and 1968 Professor Merryman was Consultant on Integral Transportation Study of Bolivia for the International Bank of Reconstruction and Development, the United Nations Development Programme and the Government of Bolivia, but none of these various bodies has endorsed the study.

The book is in two distinct parts. The first part deals with the right of transit of landlocked States as a general problem under international law. The second part is concerned solely with the special difficulties of Bolivia. There are two appendices. The first of these analyses in five sections Bolivia's relations with her five neighbours

<sup>1</sup> *Die rechtlichen Verhältnisse einer Schweizerischen Meeresschiffahrt unter Schweizer Flagge* (1918).

(Argentina, Brazil, Chile, Paraguay and Peru), and it will be observed that one of her neighbours, Paraguay, is herself landlocked. This complicates the position further, and it must not be forgotten that the States with a sea coast have reasonable claims to transit across the landlocked country for their trade to other countries in the same continent. The second appendix contains the texts of various international instruments bearing upon the problem (e.g. the Geneva Articles of 1958, the Barcelona Statutes of 1921, the Geneva Statute on the International Regime of Maritime Ports of 1923 and the New York Convention of 1965). There are also three maps and a bibliography. Unfortunately the maps are inadequate, the bibliography is very limited and there is no index.

Despite the defects just mentioned, the book is a useful introduction to the study of a very real and pressing problem. As is so often the case in international law, Bolivia's difficulties raise general issues, yet the difficulties can only be solved in practice on a local, or preferably regional, basis. It would be helpful to have more such studies dealing with the problems faced by other landlocked countries, the number of which has increased considerably in recent years. When these regional studies have been completed, it might be useful to examine whether a general theory can be stated. At the moment this subject tends to be replete with expressions like 'free access', 'freedom of transit' and so on which have no clearly defined content.

D. H. N. JOHNSON

*Völkerrechtliche Aspekte des heiligen römischen Reiches nach 1648.* By ALBRECHT RANDELZHOFFER. Berlin: Duncker and Humblot, 1967. 324 pp. DM. 44.60.

Lord Bryce's *The Holy Roman Empire* is still the only work in the English language which discusses in sufficient detail to be really informative the constitutional structure of Germany before 1806, and there is no English work which looks at the empire at all from the point of view of its status in international law. Yet the question is of the greatest importance to the study of the history of international law, and equally to historians concerned with the evolution of modern Europe. To give one example of the vital relevance of this aspect of international legal history to an evaluation of modern international law one may refer to the concept of innocent passage in the territorial sea. This began as an application to the particular case of maritime territory of the notion of passage which had necessarily developed in the complex mosaic of sovereignties that constituted the Holy Roman Empire; and the controversy concerning innocent passage of warships has its roots in that practice. And without the Holy Roman Empire it is doubtful if modern international law would have a concept of international servitude for debate.

This reviewer has long been conscious of this significant gap in English literature, and therefore found Dr. Randelzhofer's thoroughly researched and documented doctoral thesis of exceptional interest to English lawyers and historians seeking amplification of Bryce's information. In Germany the constitutional structure of the Empire has always attracted legal attention. Pufendorf, Leibniz and Moser all wrote extensively on the question, and Laband found in it fruitful ideas for legal analysis of modern federalism. Randelzhofer's contribution is to suggest that the Empire was a prototype international organization.

This suggestion immediately invites analogy with the E.E.C., and speculation as to



whether the unification of Western Europe is the necessary terminus as was the unification of Germany in the case of the empire. It must not be forgotten, however, that it was the failure of the Habsburg cause during the Thirty Years War, and French policy at Westphalia, which postponed that unification and perpetuated—indeed intensified—the fragmentation of the empire, so that several middle-sized States oscillated in relation to each other in a century of power struggle from the War of the Austrian Succession to that of 1866. It is in this sense that the analysis of the Empire from the perspective of international organization rather than from that of federalism is illuminating, and it is not particularly encouraging to the notion of inevitable political fusion.

Until 1648 the Empire was in a sense a political unity. It was the psychological impact of the concept of sovereignty adumbrated by Bodin and his contemporaries which destroyed that concept and replaced it by a notion of princely relations. The Emperor suffered in relation to the States an even more catastrophic loss of prerogative powers than did the Crown in England; and the institutions of the Empire, executive, legislative and judicial, degenerated rapidly after the Treaty of Westphalia into instrumentalities of co-operation where the princes and cities desired it, instead of being instrumentalities of superior authority.

The Treaty of Westphalia itself did not explicitly embody the change in direction. Article 8 proclaimed that the electors, princes and States should preserve their ancient rights, prerogatives, liberty and privileges without threat thereto on any pretext whatever, and that they should preserve their right of suffrage in imperial negotiations concerning legislation, declaration of war, subsidies and billeting. The effect was to reserve the *jus territoriale*, or internal sovereignty, to the States and to require virtual unanimity of voting in the Reichstag as a precondition of constitutional action at the imperial level. It is in these respects that Randelzhofer finds a parallel between the Empire and the modern international organization. Furthermore, as he points out (p. 61), the provision of Article 8 that the fundamental laws of the empire should be preserved, involving the judicial competence of the Reichskammer and the competence to execute its judgments, created a treaty-relationship between the States, so that the constitution of the empire came to be embodied in the form common to all modern international organizations.

Of special interest is Randelzhofer's classification of the theorists who after 1648 analysed the constitution of the Empire. Reinkingk and Arumaeus argued that it was a monarchy, Chemnitz—an aristocracy. Limnaeus emphasized its *status mixtus*, Besolds the aspect of a *civitas composita*. Leibniz identified international functions in the empire, and Pufendorf investigated the limitations of imperial competence and concluded that there were gaps in sovereignty. Moser took up this point and referred to limited sovereignty, while Pütter, Häberlin and Hegel developed the concept of the national State which the Empire embodied. Critically examining these opinions from the point of view of international law, Randelzhofer discusses the origins and development of the concept of sovereignty from Bodin and Loyseau, the territory of the Reich as the subject of international law, the emperor at the apex of the feudal land structure and the impact upon his position of the abstraction of sovereignty. This is thoroughly and systematically done, as is the analysis of the legislation and judicial decisions of the imperial instrumentalities of the seventeenth and eighteenth centuries.

This is an important work for historians and international lawyers concerned with the problem of the theory of the State, and a model example of the study of the history of international law. If the comparison of the Holy Roman Empire with the modern international organization suggests evaluation, not by reference to the standards of

the time, but by those of a later age, the suggestion is nonetheless a fruitful starting-point for examining the Empire from the international rather than the constitutional point of view.

D. P. O'CONNELL

*Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen 1945-1966.* Vol. I. Bearbeitet im 'Seminarium voor Strafrecht en Strafrechtspleging Van Hamel' der Universiteit Amsterdam. By ADELHEID L. RÜTER-EHLERMANN and C. F. RÜTER. Amsterdam: University Press, 1968. xxiii+788 pp. (*Registerband*, 1969, 96 pp). Fl. 4830 for the set of 21 vols.; individual volumes not separately available.

This is the first volume of a collection of German post-war judgments relating to crimes involving the death of a human being committed under the influence of National Socialism. It covers decisions issued from the end of the war until November 1947. The following volumes will contain all judgments until the end of 1965. Many of the decisions contained in this first volume have hitherto not been published. Their value as a source of information to scholars in many fields is indubitable. Not only lawyers but also historians, sociologists, criminologists and psychologists will find here a rich mine waiting for exploitation. Some of the judgments in this first volume reveal startling facts. Most of them deal with crimes committed in the last few days of the war. Fanatics still believing in Hitler were deliberately, brutally and with complete coolness killing their own fellow countrymen, including well-known and faithful party members of long standing, for no better reason than because of the victim's desire to discontinue a few days earlier a battle that everyone in his senses knew was long lost. How far human beings can be dehumanized is here illustrated with a clarity that, notwithstanding all that has happened, still comes as a shock.

In the field of international law this first volume is naturally not equally instructive. The early years of the post-war period in Germany were not conducive to deep study and contemplation of legal problems. Libraries were destroyed, courts sitting in emergency accommodation, judges and counsel were overburdened and too few in numbers. Some of the judgments, however, deal, though perhaps not very profoundly, with problems relating to the rights of the occupation powers of enacting legislation on war and other crimes in the territory under occupation. Thus Control Council Law no. 10, which retrospectively introduced the 'crime against humanity', clearly offended against several of the standards of legislation which are recognized throughout the civilized world. Retrospective legislation in the field of criminal law had been introduced by the Hitler Government early in its nefarious career. So had been—as in dictatorships elsewhere—vague terms and concepts rendering as wide as possible the sphere of free discretion open to courts packed with stooges of the regime. Superficially Law no. 10 seemed to follow the same course. The decisions here published show that nothing else was possible in the special circumstances of the case. Unique crimes cannot be caught by normal rules. Another problem dealt with here was whether resistance to a war effort which served an unlawful war of aggression, could on its part be unlawful and whether a policeman trying to arrest the resister was on his part committing an unlawful act, because he assisted the unlawful war effort. That this problem is of topical interest today requires no explanation. There can be little doubt that the further volumes will contain a large number of cases of legal interest.

The most excellent index volume makes the decisions very easily accessible. One must hope that this important series will soon be continued and completed. Quite apart from its value to scholarship, it contains documents on human cruelty and human tragedy carrying a lesson to mankind which—as experience since 1935 has shown only too clearly—is still far from having been learned by later generations.

E. J. COHN

*Soberanía del Estado y Derecho Internacional.* By JUAN ANTONIO CARRILLO SALCEDO. Madrid: Editorial Tecnos, 1969. 335 pp. No price stated.

Carrillo Salcedo's work constitutes a critical and constructive treatment of what the author calls the tension between the individual domain of the sovereign State and the collective environment in which the State acts. This is the author's main working hypothesis which leads to the necessity of understanding the function and dynamics of international law, without resorting to static institutional or legal schemes.

The author succeeds in his aims and thus presents a stimulating interpretation of the working of international law. In the first part he treats two problems strictly related to State sovereignty: the principle of self-determination and the protection of human rights. With well-illustrated passages the author searches for the possibility of a more social international law, an aim seriously restricted by what he calls the 'dogma of State sovereignty'. The underlying idea is the strong revival of nationalism and its implications specially for the protection of human rights.

A second part treats problems such as the effort of agreement by the State and the formation of treaties and customary international law, in relation to its capacity to act as a sovereign State.

The last part deals with the interaction of State sovereignty and international organization. Here some emphasis is correctly placed on the international civil service, more especially on the Secretary-General of the United Nations and the diplomacy he carries out with particular reference to the problem of maintaining the importance of the international organization without the risks involved for the independence of the sovereign State.

Carrillo Salcedo's book is an interesting and stimulating treatment of some aspects of the working of International Law in a complex epoch. It should stimulate further research on the matter by reason of its very critical character.

ANDRÉS BANDE

*The Export Trade.* By CLIVE M. SCHMITTHOFF. 5th edition. London: Stevens & Sons Ltd., 1969. xxxii+451 pp. including Index. £5.50.

The appearance of a new edition of this well-known work on international trade is a most welcome event. The general character of the book remains unchanged. Its chief virtue lies, as before, in the great amount of accurate and useful information which Dr. Schmitthoff manages to compress into (in this edition) less than 420 pages of text. In this age of specialization, one must particularly admire Dr. Schmitthoff's breadth of knowledge, which enables him to write with equal assurance on such diverse topics as sale and carriage of goods, restrictive trade practices, export credit guarantees, exchange control and many other subjects related to the export trade. The book



contains, in addition, a good deal of material which is not of a strictly legal nature but which might best be described as practical information for exporters.

So far as the present reviewer (whose range is much narrower than Dr. Schmitthoff's) can determine, the task of bringing the book up to date has been undertaken with great care and thoroughness. Account is taken not only of changes in the law brought about by legislation and judicial decisions, but also of international conventions (whether or not they have the force of law in the United Kingdom) and of developments in commercial practice, such as the Uniform Customs and Practices for Documentary Credits 1962, and the possible effect of using containers on the law and practice relating to the export trade. One completely new chapter is added, on the Uniform Laws on International Sales; to make room for this, the chapter on tax law has been omitted. The actual law discussed remains almost exclusively English law, except that much of the relevant legislation applies to all parts of the United Kingdom. Politically foreign systems are not, as such, discussed, though they are from time to time mentioned by way of contrast to some particular rule of English law. The American Uniform Commercial Code is referred to on a number of occasions; but it would not be reasonable, in a book of this size and scope, to expect full references to and discussions of the Code.

In a book which covers so many topics in such a relatively small space something must, inevitably, be sacrificed; and that something in this case is full discussion of legally controversial points. Some of these are simply omitted, perhaps because they are not important in practice: for example, the controversy about the legal nature of bankers' commercial credits. Others have to be dismissed with the remark that they await judicial settlement (p. 252) or that the cases yield no well-defined principles (p. 271). Dr. Schmitthoff cannot, in the space available, suggest how such controversial points might be argued one way or the other; nor can he do much to provoke speculation in the minds of students, who are envisaged as one type of reader of this book. This point is not made by way of adverse criticism of this new edition. Dr. Schmitthoff writes mainly for businessmen and their professional advisers; and he makes it clear, again and again, that he is more concerned with the prevention of legal disputes than with their solution. It is indicative of this general approach that the fairly full treatment of sale of goods contains no extended discussion of remedies. For the purposes for which it was written, *The Export Trade* remains, by reason of the great amount of accurate and up-to-date information contained in it, a most valuable book.

G. H. TREITEL

*Die 'wohlerworbenen Rechte' der Bediensteten in der Rechtsprechung des Gerichtshofes der europäischen Gemeinschaften.* By MEINHARD SCHRÖDER. Bonn—Bad Godesberg: Godesberger Taschenbuch-Verlag G.m.b.H., 1969. 120 pp. DM. 14.80.

The legal position of the officials of the European Economic Community has given rise to a surprisingly large number of disputes and consequently of decisions of the Luxembourg Court. One of the most crucial among the problems, with which the Court had to grapple, resulted from the necessity of determining how far the rights of the two groups of officials—both those appointed under statutory rules issued by the Community and those engaged by ordinary contracts—could be altered,

supplemented or even abolished by way of legislative or administrative action on the part of the Community. Such action was in fact in a number of cases resorted to because it was thought to be justified by economic or organizational developments which had not been foreseen when the officials in question entered into the service of the Community. It can scarcely be thought surprising that officials confronted with what in some cases amounted to a very serious deterioration of their position sought to obtain relief from the Court. When deciding upon such a claim the Court tried to find guidance from the old-fashioned, but still not quite unfashionable concept of 'well-acquired rights', in a manner very similar to that adopted by the courts of some of the member States when confronted with similar claims by national civil servants. No doubt, the author of the present short book is right in objecting to this method on the ground that it places undue emphasis on the personal rights and privileges of the officials and tends to neglect the possibly larger and more pressing needs of the service. He argues that the Court would have done better to resort to the concept of 'institution' as developed by Hauriou and his school and suggests that this would have rendered it possible to establish a circle of situations in which the rights of the official must on principle yield to those of the service to which he is attached. That such situations exist should be admitted. But that an abstract concept like that of the 'institution' can help in deciding individual cases sounds highly unlikely. In fact there is every reason to fear that by following the learned author's advice the Court would merely replace one type of verbiage by another instead of adopting the only course that promises success, i.e. of careful fact research followed by a meticulous comparison of the weight of interests on both sides of the dispute. Readers in the common law countries in particular will find little relish in the abstract character of the author's argument and even less in his tendency to say in long and complex sentences what could well have been expressed clearly in simple and direct language.

E. J. COHN

*Foreign Investments and International Law.* By GEORG SCHWARZENBERGER. Library of World Affairs No. 68. London: Stevens & Sons Ltd., 1969. xxiii+237 pp. (Index and Bibliography). £3.90.

The author's starting-point is that there is no difficulty in ascertaining the relevant rules of international law on the protection of foreign investments. Problems arise from the lack of provision for the impartial and, if necessary, compulsory ascertainment and analysis of the facts and for the enforcement of the rules through legally controlled processes. He has therefore determined to explore the ways in which these problems have been met in British practice, which may claim to be of general interest given her unparalleled continuity in the practice of international law, her leadership of the industrial revolution and of the process of de-colonization, and as the cradle of Anglo-American law. Situated on the Atlantic fringe of Western Europe, the author suggests that Britain forms a bridge between the legal systems of the transatlantic and continental capital-exporting States as well as between the Anglo-American legal systems and those of a considerable number of new independent States. A second object of the book is to evaluate effective application and enforcement of the legal rules, and a third is to respond to the call of U.N.C.T.A.D. for further studies of aspects of private foreign investment, with particular reference to developing countries.

As for the relevant rules, the minimum standard of treatment for private foreign



property is a relative and subjective one, with the capacity of self-adaptability, qualities shared with other rules of customary international law. 'What constitutes expropriation and justifiable interference with foreign property cannot be determined in the abstract. On these matters, as on the quantum and modalities of the payment of the compensation due, the minimum standard of international law continuously and imperceptibly varies with the changing views on these matters held by the preponderant number of subjects of international law' (p. 4; see also p. 123). What has been the effect of the 'population explosion' among the subjects of international law? Is it now sufficient to render partial compensation, or is the standard still 'full' or 'adequate' compensation? The author cannot discern any change in the traditional rule requiring full (or adequate) compensation. The burden of proof is on those who assert that the preponderant number of States have ceased to accept the traditional standard as law. Poverty and economic inviability explain difficulty in complying with legal obligations but are not 'an acceptable substitute for evidence of a changing *convictio juris*' (p. 8). Bilateral agreements for partial compensation do not constitute *per se* evidence of any change in the customary law. It is suggested that the rule could be formulated in terms of a general principle of law, given the inclusion in so many constitutions and laws of States (old and new) of provisions affirming the protection of private property (p. 9).

In his analysis of British practice since 1945, Professor Schwarzenberger concentrates on treaties, and classifies relevant agreements concluded by the United Kingdom into six types (p. 30): general economic and commercial treaties; nationalization (or compensation) agreements; devolution agreements with newly independent States; 'rescue agreements'; agreements liquidating a *status mixtus*; and relevant regional treaties, such as the O.E.C.D. Code of Liberalization of Capital Movements, and the E.F.T.A. Agreement. 'Rescue agreements' are those by which help is given indirectly to U.K. exporters and investors by monetary assistance or loans to debtor countries which would otherwise be unable to meet their obligations. The rescue thus extends both to debtor governments and to bondholders and investors. Examples are agreements to liquidate or refinance commercial debts, and interest-free loans. Agreements liquidating a *status mixtus* mean the 1959 Agreement with the United Arab Republic on Financial and Commercial Relations and British Property in Egypt, and the 1966 Agreement with Indonesia settling claims arising out of incidents in 1963. Among the nationalization agreements considered is the 1968 agreement with the U.S.S.R. The author says that by this agreement the *de facto* recognition previously extended by the United Kingdom to the incorporation of the Baltic States into the Soviet Union in 1940 has been transformed into *de jure* recognition. While this is a possible interpretation, it should perhaps be pointed out that this is not the view of Her Majesty's Government as stated in Parliament during the debates on the Foreign Compensation Bill in 1968.

In evaluating the efficacy of the various protective treaties for British investors, the author examines two test cases, the Anglo-Iranian oil dispute and the nationalization of the Suez Canal Company, these being the most significant disputes in this field in which Britain has been involved since 1945. The pre-1914 Anglo-Persian treaties helped the United Kingdom to make a plausible case before the I.C.J. but were otherwise of little use, since they patently had not restrained the Iranian Government from its unilateral actions. Their existence may have improved the British position before world public opinion and may have had a marginal influence on United States policy, although it is common knowledge that other factors took the central place in shaping that policy. The safeguards in the 1933 Concession are compared with similar provisions in the 1954 Consortium Agreement. In the case of the Suez Canal Company,



there were no directly relevant treaties. The argument that the nationalization was in some way a breach of the Suez Canal Convention of 1888 is briefly mentioned and rightly dismissed as 'too sophisticated to carry conviction' in view of the Company's Egyptian nationality, expressly affirmed in the 1866 Concession. Following the emphasis on treaty practice earlier in the book, and the announced object of the examination of these two cases, it is rather unfortunate that in each instance treaties were of marginal relevance. One could have wished for a discussion of the efficacy of the Round Table Agreements and subsequent treaties between the Netherlands and Indonesia as a protection for Dutch investment, but the author's decision to concentrate on British practice has deprived us of this. However, the Iranian and Egyptian cases illuminate the operation of other sanctions, which may serve as protective measures for the future by example, namely, economic retorsion and retaliation, and the use of armed force. The latter response has to be ruled out in the future, and the legal and political restrictions upon its use constrained British policy even before the Suez affair. Various reasons are suggested for the paucity of bilateral investment-protection agreements in British practice over the last twenty-five years, including fear of misinterpretation of good intentions as neo-imperialism, but the author also submits that 'perhaps the most inhibiting factor was the nagging doubt in the United Kingdom whether, under the system of the Charter of the United Nations, bilateral investment treaties constituted any more effective form of protection of foreign investments than the obligations incumbent in any case on capital-importing States under international customary law or the general principles of law' (p. 104).

At this stage Britain was ready to consider multilateral schemes. Subsequent chapters examine the Abs-Shawcross Draft, the I.B.R.D. Convention on Settlement of Investment Disputes, the O.E.C.D. Draft Conventions of 1962 and 1967 and suggestions for an international investment insurance agency. On Abs-Shawcross, the author admits that these provisions may be the minimum of protection that is required against unreasonable interference by host States, but the political price of accepting such terms is too high for 'even moderate governments of capital-importing countries' (p. 134). The machinery established by the I.B.R.D. Convention has yet to be used. The achievement which the Convention represents is nevertheless already, relatively, 'astounding'. To emphasize procedure rather than substance was 'a stroke of genius' and if perhaps such an approach 'was more ingenious than ingenuous, the explanation lies in the unavoidable relativity of the distinction between form and substance in the reality of law as in any other sphere of human endeavour' (p. 152). The O.E.C.D. Drafts are compared with the Abs-Shawcross to indicate the decreasing self-confidence of those concerned with safeguarding capital exports in the last decade. These drafts represent the bare minimum, or may indeed have fallen below that level. Even if some of 'the least significant among capital-importing countries (found) it politically feasible—or necessary—to become parties to such conventions', what difference would this make for protection of investments (p. 169)? The answer clearly intended by Professor Schwarzenberger, although not apparent on the printed page, is hardly any.

If the investor is sceptical of the protection afforded by customary international law, bilateral treaties, concessions with built-in safeguards *et al.*, this may be because he is less tough than the merchant adventurers of old (p. 199). But observable trends in modern economic and political life constitute the more probable cause, and a considerable justification of his increasing reluctance to invest in many capital-importing States. He can invest in areas where his property is protected by 'favourable legal systems, supported if required by the whole of the political, economic and military power of capital-exporting States' although the legal restraints on the use of the third

type of power is not referred to again at this point. Such areas are limited to the technologically advanced countries and such of 'their hinterlands' as are connected with them in common markets or free-trade areas. In short, 'caveat investor' and let not his adviser be ashamed of pessimism. There is always the chance that he may be proved wrong.

This reviewer was disappointed that Professor Schwarzenberger stopped here. The fundamental question of the role of international law in this field remains unasked. Earlier in the book, the author states that the laws protecting private enemy property in war are of relevance to the standard applicable in peacetime to foreign property, in that they form an absolute minimum standard. In no circumstances may the treatment of aliens in peace or *status mixtus* fall below the treatment accorded to private enemy property. This may be a receding test, of diminishing correspondence to economic and social changes, if one takes the position that there is less scope for the application of the laws of war since the U.N. Charter. One consequence is that the practice of the 'preponderant number' of contemporary subjects of international law did not form part of the creative process of these rules on treatment of enemy property. But the proposition has the merit of compelling attention to the purpose of law in the two spheres. Why protect private enemy property in war? As a recognition of the reasonableness of the demand of civilization that 'normal' life for non-combatants should be respected, with the hoped-for consequence that the resumption of political and economic intercourse between the former belligerents may not be permanently impeded by past hostilities. What does civilization demand in peace? In order to achieve a 'normal'—even a barely adequate, standard of life for the inhabitants of the poor South of the world, there is an acute need for fairer terms of international trade, increased inter-governmental and institutional aid, and, at the lowest, no lessening of the flow of private investment into these countries. Given that the investor is *not* always seeking to maximize profits and secure the highest possible return on his investment, but directs efforts increasingly towards other goals of a social and political nature, and towards general economic growth in the particular host country (see Galbraith, *The New Industrial State* (1967) *passim*), in what way might international law play a part in shaping goals which come to be recognized as desirable by investors, and in devising effective means for their achievement, in the sense of avoiding conflicts between investors and host governments and providing means of settling disputes that do arise on a basis of reasonably certain and apparently reasonable rules? It is questions of this order which need to be rethought. Meanwhile, there is much to be said for Professor Schwarzenberger's dispassionate approach, which leads him to conclude that the law has remained unchanged, that compliance with it has been seen to be decreasing for several decades, and that the remedy for those who seek further private foreign investment lies largely in their own hands.

GILLIAN WHITE

*International Law as Applied by International Courts and Tribunals. Vol. 2: The Law of Armed Conflict.* By GEORG SCHWARZENBERGER. London: Stevens & Sons Ltd., 1968. lv+881 pp. £8.40.

This is the second volume in Professor Schwarzenberger's monumental study of international law as applied by courts and tribunals, and it forms an integral part of his doctrinal system. The great bulk of references in the text are to his other works,



though there is an extensive bibliography of 60 pages compiled by Professor Bin Cheng, R. H. F. Austin and E. D. Brown.

The law of armed conflict is here laid out on classical lines, the work being divided into nine parts entitled: fundamentals; the law of land warfare; the law of air warfare; the law of belligerent occupation; the law of sea warfare; enforcement of the rules of warfare; the law of neutrality; internal armed conflict; and the termination of armed conflicts. The status on 1 September 1967 of The Hague Conventions 1899 and 1907, the Geneva Conventions 1949 and the Poison Gas Protocol 1925, is set out in three appendices.

The limitation of the work to international law as applied by courts and tribunals does not of course exclude extended analysis of the major conventions; on the other hand, it is to be noted that the great majority—over four-fifths—of the decisions cited are prior to 1939 and nearly a quarter prior to 1900. Further, the kinds of armed force which are principally examined are those used in a state of war or *status mixtus* of peace and war, between States, and their legality or illegality are determined in a largely traditional conceptual framework. The combined effect of these limitations is that the state of law applicable to those forms of armed conflict within States, which have been predominant since 1945, is looked for in the interstices of old rules rather than seen as needing exmination afresh and, if possible, formulation in contemporary terms: so, for example, the conflicts in Korea and Vietnam, and the use of United Nations forces, receive only slight and incidental mention, and the part devoted to internal armed conflict is concerned principally with the relations between revolutionary forces within a State and third States.

Professor Schwarzenberger remarks that 'an air of paradox surrounds the law of warfare' (p. 9), the paradox of legalizing the sovereign use of force, and of attempts to civilize war. Two competing factors, formative of rules, can be traced through the book, 'the necessities of war' and the standard of civilization. Professor Schwarzenberger derives from the international decisions a concept of the necessities of war as the acts and responses of primordial sovereignty: 'the unrestrained freedom, in principle, of belligerent States in the actual conduct of hostilities, but for this purpose alone . . . They comprise any situation in which the application of force for purposes of the prosecution of the war is not limited by relevant rules of warfare' (p. 135). This area is in principle reduced as the standard of civilization advances. The necessities of war have therefore to be distinguished from military necessity in a particular situation, the first serving the ultimate object of war 'the imposition of the victor's will on his enemy' (p. 10), and the second serving special strategic or tactical needs. It is possible to deduce from these various principles that the necessities of war, as an unrestrained exercise of sovereignty, are limited to the conduct of such hostilities as will achieve the ultimate object of war as defined. It is not easy to align Professor Schwarzenberger's reflections on total war with this conclusion. He says: 'In view of the conduct of air warfare during the Second World War and in Viet-Nam, the inconclusiveness in this respect of relevant post-1945 treaties and the generally known preparations made by all major Powers for air and missile warfare with "conventional" and thermo-nuclear warheads, it appears impossible to state with any confidence that near-total air and missile warfare runs counter to the contemporary laws and customs of war' (p. 159). The point here is not whether the use of nuclear weapons is to be regarded as immoral and contrary to any standard of civilization, which it plainly is, but the fact that these and other weapons, already in use or envisaged, are manifestly ineffective in achieving what is defined above as the legitimate purpose of war.

J. E. S. FAWCETT



*International Custom and the Continental Shelf: A Study in the Dynamics of Customary Rules of International Law.* By ZDENEK J. SLOUKA. The Hague: Martinus Nijhoff, 1968, x+186 pp. Fl. 25.20.

According to Dr. Slouka, who is a Professor of Political Science at Columbia University, the mystery of international customary law will never be unravelled until traditional theory has been replaced by a completely new set of conceptual tools. He argues that the traditional criteria for ascertaining customary rules presuppose a classification of these rules as either general or universal. He regards this approach as unreal and as obscuring the dynamic nature of the growth of customary rules, which is a process whereby 'the political discretion of states gradually narrows down into progressively restrictive, unavoidable and finally, obligatory patterns' (p. 4).

The statics and dynamics of international custom can only be truly discerned by asking not how many States maintain a certain practice but in how many instances of State-to-State relationships does that practice predominate; every customary rule binding on two or more States consists of a number of specific bilateral relationships which in their legal aspect may take the form of estoppel, prescription or tacit or express consent. The author claims that the *Fisheries* case lends strong support to this thesis.

Using this bilateral approach as the *modus operandi* the author devotes the remainder of the book to a case-study of the legal regime of the continental shelf. The major part of the study is concerned with a blow-by-blow account of the legal development of the continental shelf from the Truman Proclamation of 1945 to the Geneva Convention of 1958. Apart from an interesting chapter on the political and economic factors underlying State practice, very little of significance emerges from the analysis that has not already been said elsewhere.

The bilateral perspective is then focused upon a series of imaginary dispute-situations involving different sets of States at different times during the period 1948-60; for example, the author suggests that as early as 1948 the United Kingdom and the U.S.A. were each estopped from demanding access to the mineral resources in the geographically defined continental shelf areas of the other and that each was obligated, at least towards the other, to maintain reasonable safety standards.

Surprisingly, the author virtually ignores legal developments relating to the continental shelf since 1964; in particular, there is no reference to State activity in the North Sea area and to the problems of the legal status of the deep-sea floor. It is interesting to note that the judgment of the International Court of Justice in the *North Sea Continental Shelf* case (*I.C.J. Reports*, 1969 p. 3), in several respects substantiates the analytical framework proposed by Dr. Slouka. It is reflected in the Court's examination of the specific bilateral relationships between the Netherlands, Denmark and West Germany (*ibid.*, pp. 25-7) and also in the time-scale of its inquiry into the legal status of the equidistance principle (*ibid.*, pp. 37-45).

The standard of scholarship of this book is uniformly high. However, the author undoubtedly exaggerates the novelty of his thesis regarding the nature and operation of international customary law. In a world of over 130 States there can be very few international lawyers who would not regard the conclusions of this book as inevitable.

J. C. WOODLIFFE

*La Conclusion des accords en forme simplifiée.* By PAUL-F. SMETS. Brussels: Centre interuniversitaire de droit public, 1969, xix + 251 pp. + Bibliography. BF. 520.

The present volume is the third in Professor Smets's study of the law and practice surrounding the operation of Article 68 of the Belgian constitution concerning the treaty-making power. In his earlier volumes, *L'Assentiment des chambres législatives aux traités internationaux* (1964) and *Les Traités internationaux devant la section de législation du Conseil d'État* (1966), Professor Smets considered the position of parliament and the practice of the Conseil d'État; the present study examines in a lucid and interesting way the increasingly important question of the legal status of executive agreements.

Professor Smets begins by examining the factors responsible for the rise in importance of the executive agreement. The need to obtain legislative approval is, he suggests, regarded as a hindrance to swift executive action in the treaty-making field and when domestic constitutions are obscure and international law flexible, the way is clear for the executive agreement to supplement or even displace formal treaty-making procedures.

The second part considers the position of executive agreements in international law with reference to State practice and academic writings. After discussing a number of diverse views on the validity of treaties concluded in contravention of domestic constitutions Professor Smets endorses the views and reasoning of the International Law Commission. It is a little unfortunate that Professor Smets's publication date prevented him from rounding off this discussion by noting the adoption of the Commission's proposals in Articles 46 and 47 of the Vienna Convention.

Part three is a brief exercise in comparative law, a rapid review of the constitutional position of executive agreements in a large number of municipal legal systems. It is of course impossible for any writer to do more in a few pages than summarize the complexities of, say, United States' law and the Bricker amendment controversy, and Professor Smets's account is no more than a summary. Indeed his account of the practice of a number of States is no more than a statement of the relevant terms of their constitutions. But though this survey is brief it does succeed in putting the Belgian position into perspective and in indicating the great diversity of international practice.

Parts four and five are devoted to Belgian law, part four forming the core of the work with Professor Smets's concise analytical survey of Belgian practice. His investigation reveals that though the legality of executive agreements is in principle acknowledged and a large number and wide variety are regularly concluded, the limits of executive authority on this matter are obscure.

Clearly the crux of the problem in Belgium as elsewhere is finding a clear and appropriate boundary between executive and legislative functions. In the last section of his book Professor Smets turns to this question and examines various proposals for changes in the constitution to put executive agreements in Belgian law on a more satisfactory basis. Here Professor Smets presents a persuasive case for the approach which he has developed in partnership with Professor De Visscher, a constitutional amendment which would expand Article 68 to include an enumeration of permissible types of executive agreement, together with a provision temporarily dispensing with parliamentary approval in certain emergency situations.

The extensive bibliography is particularly strong on the continental literature. An unusually detailed table of contents to some extent compensates for the surprising omission of an index.

J. G. MERRILLS

*Die gewohnheitsrechtliche Regelung der Gerichtsbarkeit über fremde Staaten im Völkerrecht. Versuch einer Reinterpretation der Praxis.* By JENÖ C. A. STÄHELIN. Bern: Herbert Lang & C<sup>ie</sup>, 1969. 128 pp. DM. 25.

Jurisdiction over foreign States or, conversely, immunity from foreign jurisdiction is a subject of current practice, and a difficult one, because traditional rules have changed and the new law is not yet clear. State immunity is not identical with diplomatic immunity, and State immunity has been discovered later, so to speak.

Many a student of this subject may have asked himself whether the status of the State in municipal law has not determined the position of foreign States before the courts. Was it not natural to exempt foreign States from jurisdiction as long as the State of the forum could not be brought before a judge? Tempting as the idea is, it does not appear that the writers have made any effort to investigate the possible interdependence of national and international law. The German Society for International Law (Deutsche Gesellschaft für Völkerrecht) has had a committee working on State immunity, and its theses 25, 26, and 31 reject the influence of the municipal law of the forum (vol. 8 of the *Reports*; see also Alexy in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 22 (1962), pp. 671-6).

Stähelin is of the opposite opinion. His analysis of the pertinent jurisprudence leads him to the conclusion that a State may (and mostly does) accord immunity under the same rules under which it enjoys exemption from the jurisdiction of its own courts (pp. 99, 101). He himself must admit, however, that his rule does not apply to administrative justice.

The book is interesting, but hardly convincing reading. State immunity remains a problem to be explained: another approach is to reduce it to immunity *ratione materiae* for acts of State (Kiesgen, *Sachliche Indemnität der Staaten, internationalen Organisationen und ihrer Organe* (Bonn, 1970)).

F. MÜNCH

*L'Individu et le droit de la Communauté économique européenne.* By MAURICE TORRELLI. Montréal: University Press, 1970. 396 pp. \$9.50.

In this monograph, Professor Torrelli starts from the proposition that recent improvements in the status of the individual in international law have occurred mainly through the instrumentality of international institutions. It is in areas in which such institutions operate, it is argued, that the individual has had most impact upon international law. It is with this idea in mind that the author analyses the place of the individual in the law of the European Community.

That place is seen in terms of the application of Community law to the individual and of the judicial remedies that are available to him in a case of breach. The question of applicability leads to a discussion of the self-executing character of the Rome Treaty and of the relationship between Community regulations, etc., and the municipal law of member States, as well as to an examination of the scope of the law-making power of the Community. This discussion is preceded by one of the best parts of the book in which the author studies and reflects upon the role of the Commission, composed of individuals acting independently of their national State, in the Community's decision-making process. The question of judicial remedies gives rise to a consideration of the individual's opportunities to challenge the Community's rulings before national courts as well as of the jurisdiction of the European Court of Justice. As to the latter, there is a full account of the relevant case-law.



The author's comments at various points in his analysis indicate his opinion that within the Community so far the individual has been given mostly obligations rather than rights and that member States, emphasizing the international rather than the federal character of the Community, have been reluctant to loosen their grasp upon him. There is evidence to support such a standpoint although, theoretically, much of what is said about the application of Community law to the individual must depend upon the view taken of the relationship between municipal and international law. Similarly the significance for international law of the individual's right of access to the European Court must depend upon that taken of the legal nature of the Community.

Although much of the book consists, as will be apparent, of a study of topics that have been considered in other writings, the author keeps a tight rein on his treatment of them so that its theme is properly developed. Nonetheless, some criticisms might be made. More reference to the position of companies and similar juridical persons, as distinct from that of individuals proper, might have been of interest, as might discussion of questions such as the freedom of movement of workers. Some consideration in the final chapter, where the question of the existence within the Community of a legal status of 'European' is discussed, of the European Convention on Human Rights and the European Social Charter might also have been profitable. On a different level, the sources used are limited in that the literature in English on both the position of the individual in international law and the Community is not used. The over-all impression, however, is of a thoughtful, well-written and worthwhile piece of work.

D. J. HARRIS

*Traité internationaux et juridictions internes dans les pays du Marché Commun.* By MICHEL WAELBROECK. *Centre interuniversitaire de droit comparé*, Brussels, 1969. 348 pp. (incl. Annex and Bibliography). Paperback. 700 BF or 80 FF. Bound. 1000 BF or 115 FF.

The relationship between treaties and domestic law has never lacked theoretical interest; with an increasing number of treaties concerned with domestic legal matters it has now also achieved considerable practical importance. For the member States of the European Economic Community the issue has a particular significance and it is the legal systems of these States and their treatment of treaties as a source of law that are the subject of Professor Waelbroeck's latest study.

The work is divided into three parts. In the first Professor Waelbroeck examines the constitutional provisions and practices of each State relating to the publication of treaties and the role of the executive and legislature in their making and implementation. The author's concise account brings out very clearly the difficult questions of international, as well as domestic, law that the court may be required to answer, and the important differences between the laws of each State. The constitutional provisions themselves are usefully set out in an annex at the end of the book.

The second section is devoted to a discussion of the domestic court's approach to the validity of treaties in international law and the problem of self-executing treaties. While Professor Waelbroeck finds the courts very ready to investigate formal validity, it is otherwise with questions of material validity. He argues convincingly that the difference is to be explained by the courts' reluctance to interfere with matters of foreign policy. The point, which will be familiar to students of the act of State doctrine and the *Sabbatino* case, is borne out by Professor Waelbroeck's finding that in the Six

it is those courts which enjoy greatest independence of the executive that have been the most ready to consider investigating questions of material validity.

The third section of the book deals with the way in which the courts of the Common Market countries interpret treaties and resolve conflicts between treaties and domestic law. Here again a considerable diversity of practice is competently summarized.

Professor Waelbroeck is concerned throughout to stress the practical rather than the theoretical aspects of the problem. He shows that whether the ostensible approach adopted by the courts is monist (as in the Netherlands) or dualist (as in Italy) the result is frequently the same and usually corresponds to the dualist theory. It is, he argues, clear that in the Six the domestic judge, when faced with a treaty question, sees himself as an agent of the national and not the international legal order. The courts' approach to the treaty as a source of law is regulated by restrictively interpreted national constitutions so that, for example, only in the Netherlands and Luxembourg are treaties permitted to override subsequent legislation. Even in these States subsequent changes in the constitution prevail over treaties and the requirement of publication can be seen as a defensive reflex by the domestic legal order to the threatened penetration of international law.

But, the author explains, despite this dualistic tendency, the courts of the Six try to avoid striking down treaties for conflict with domestic law. Interpretation is aimed at reconciling international and domestic law. It is also recognized that treaties should be interpreted by reference to international rather than domestic rules of interpretation. In view of the recent agreement on these rules in the Vienna Convention, the work of the English and Scottish Law Commissions in this area and the recent decision of the Court of Appeal in the *Corocraft* case, there is much here of current interest to the British lawyer.

Professor Waelbroeck concludes with a brief speculation on the future. The impact of the Common Market, he suggests, may in the long term radically change the attitudes of domestic courts:

Il n'est pas exclu qu'avec l'intégration progressive des relations juridiques, une mutation se produise dans l'attitude des juges, et que le droit communautaire vienne à être considéré comme primant le droit interne, de quelque nature qu'il soit, non point par la grâce de la constitution nationale, mais en vertu de sa nature propre d'ordre juridique supérieur aux États et accepté par eux sur une base de réciprocité (p. 305).

This view of the status of Community law was taken by the Court of Justice of the European Communities as long ago as 1963. A question which British lawyers might ponder is whether in the event of Britain's joining the Common Market British courts might eventually come round to a similar way of thinking.

Professor Waelbroeck's extensive bibliography is stronger on the continental literature than on English works, though the contributions of Judges Fitzmaurice and Lauterpacht and Dr. Morgenstern are among those noted. It is greatly to be regretted that a book, which has so much to offer in the way of scholarly analysis, for some unaccountable reason has no index.

J. G. MERRILLS

*Legislative Powers in the United Nations and Specialized Agencies.* By EDWARD YEMIN. Preface by Michel Virally. Leyden: A. W. Sijthoff, 1969. xvii + 227 pp. Dfl. 28.

This century has spawned large numbers of international organizations. Only time will tell their full effect on the international community but it is natural that these new

organizations, like new States, should struggle not merely to justify their existence but to establish a personality. Although they derive no independent personality from any concept of sovereignty it is natural to look into them for a character distinct from the sum total of the personalities of their member nations. For an economist or politician this can be found by examining their special function, their ethos and methods, but lawyers, for better or worse, tend to be more interested in structure, form and power. The result is a tendency to give their structures almost more analysis than they can bear.

The intensity of contemporary international relations, the diversity of interests and the speed of change effectively rule out one of the major sources of international law—custom—from making any further substantial contribution to the development of international law. The contribution of judicial decision and text writing will necessarily remain small, in part because of the shortage of the former and the surfeit of the latter. This leaves the treaty as the only effective source of new international regulation. Treaty-making is an exercise which needs more patience and goodwill than is commonly found in the international community, requiring as it does, unanimity. This is where the organizations may come in. To some extent many of them have an internal law-making facility which sometimes goes beyond the mere determination of the extent of their executive function so as to regulate in some limited and specialized way the framework of lawful activity of member nations. There is no immediate probability of extending this process to take it beyond the facilitation of the executive function of the organization to a point where it can develop substantially the lawful framework of the international community, though the European Economic Community has made regional advances in this area which show what is possible (and what is not possible).

Mr. Yemin, who is on the staff of the International Labour Organization, tackles six main areas: (i) constitutional amendments and the procedure for completing them in the U.N. and in the specialized agencies; (ii) the revision of legal instruments in the International Telecommunication Union; (iii) the revision of the Acts of the Universal Postal Union; (iv) the enactment of technical instruments and other regulatory activity in the International Civil Aviation Organization; (v) the enactment of technical instruments in the World Meteorological Organization, and (vi) the enactment of technical regulations in the World Health Organization. The result is a careful and painstaking analysis of the forms and processes of revision and an attempt to measure their legislative significance against certain criteria. These are that the new rules are produced by an unilateral rather than a contractual form, have legal force and a generality of application. In the first three areas he is concerned with constitutional amendment and in the others with the adoption or amendment of technical regulations. He succeeds in showing that a fair degree of legislative competence is enjoyed by many of these bodies and, although most illustration is concerned with technical points or internal house rules, it is not without interest to see the different patterns developing within the different bodies.

The work is nicely produced and although the study Mr. Yemin set himself involves a painful amount of sifting, his style is good, though there are a few printing errors. Involving as it does so much coverage of technical regulations, it is not a book for light reading, but it stands as a careful and thorough piece of investigation.

J. A. ANDREWS



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